COMMISSION ON STATE MANDATES
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December 28, 2006

Ms. Bonnie Ter Keurst
Auditor Controller-Recorder
County of San Bernardino
222 West Hospitality Lane, Fourth Floor
San Bernardino, CA 92415-0018

RE: Request for Reconsideration of Prior Final Decision –Amendment of Parameters and Guidelines on December 4, 2006, *Peace Officers Procedural Bill of Rights*, CSM-4499 and 05-RL-4499-01, Government Code Sections 3300 through 3310
County of San Bernardino, Requestor

Dear Ms. Ter Keurst:

On December 26, 2006, the Commission on State Mandates received the County of San Bernardino's (County) Request for Reconsideration of the Commission's Prior Final Decision – Amendment of the Parameters and Guidelines, *Peace Officer Procedural Bill of Rights*, CSM-4499 and 05-RL-4499-01, on December 4, 2006.

This filing is being returned to the County because reconsideration of a parameters and guidelines amendment is not authorized by Government Code section 17559. Section 17559 authorizes the Commission to reconsider all or part of a test claim or incorrect reduction claim on petition of any party, if timely filed. However, the County may file a written request to amend, modify, or supplement the parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

This decision may be appealed to the Commission pursuant to California Code of Regulations, title 2, section 1181, subdivision (c).

If you have questions, please contact Nancy Patton, Assistant Executive Director, at (916) 323-8217.

Sincerely,

Paula Higashi

PAULA HIGASHI, Executive Director
Commission on State Mandates
(916) 323-8210

Enclosure
Cc: Mailing List (without enclosure)

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

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LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

December 22, 2006

REQUEST FOR RECONSIDERATION OF PRIOR FINAL DECISION

On behalf of County of San Bernardino

Government Code sections 3300 through 3310

Claim nos. CSM-4499 and 05-RL-4499-01
05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22

Peace Officer Procedural Bill Of Rights

Interested Party, County of San Bernardino, requests the Commission on State Mandates grant a hearing on the merits to reconsider its recent decision amending the parameters and guidelines of the Peace Officer Procedural Bill of Rights (POBOR) mandate. The County submits the following in support of its request.

INTRODUCTION

In 1999, this Commission issued its Statement of Decision in the Peace Officer Procedural Bill of Rights (POBOR) test claim finding that the legislation created a reimbursable state mandate. (Administrative Record (AR) at pp. 860-887.) In 2005, the Legislature requested, though AB 138 (Statutes of 2005, chapter 72, section 6), that the Commission address the applicability of the recent decisions of the California Supreme Court.

On June 15, 2006, the County brought forward a motion to amend the P's and G's to, *inter alia*, bring them into conformity with the original statement of decision with regard to interrogations. At the hearing on December 4, 2006, in addressing the proposed amendment, this Commission relied on the fact that this issue had been resolved by the reconsideration and that it was not properly pending before the Commission. In so doing, this Commission engaged in an error of law — the issue was properly pending before the Commission and required their due attention and decision.

In light of this error, this Commission should grant the County's request for a reconsideration and, finding that there is no evidence in the record to reverse the original decision of this Commission, reinstate the reimbursement for interrogation costs beyond the off-duty overtime payment to the peace officer subject of the interrogation.

A. Commission's Reliance on Staff's Assertion Regarding the Scope of the Prior Reconsideration Was an Error of Law.

Requests for reconsideration are permitted under California Code of Regulations, title 2, section 1188.4, subdivision (b), which states:

> Except as provided elsewhere in this Section, any interested party, affected state agency, or commission member may request that the commission reconsider or amend a test claim decision and change a prior final decision to correct an error of law.

In the instant case, the error of law was posed at the hearing when Commission Staff Counsel opined that the issue regarding interrogations had been decided as part of the reconsideration pursuant to AB 138 and was not properly before the Commission.[1] After which, this Commission found in accordance with the Final Staff Analysis that the issue had been resolved in the reconsideration. Staff, however, failed to recognize that: 1) the original statement of decision on the issue of interrogation was not accurately reflected in the parameters and guidelines, 2) the reimbursability of interrogation costs was specifically not addressed in the April 26, 2006, reconsideration decision and 3) an amendment properly brought before this Commission was pending and required resolution.

1. The 1990 Statement of Decision Included the Costs of Interrogation.

This Commission, in 1990, addressed the test claim legislation of POBOR which provides safeguards for the protection of peace officers that are subject of investigation or discipline. Of primary concern was whether and to what extent these safeguards and protections were more expansive than those already in existence through statute, case law and the Constitution. Indeed, as evidenced in the Statement of Decision, this Commission took particular care to root out those protections that were not duplicative of pre-existing due process rights and to delineate the scope and extent of the state-mandated activities. (AR at pp. 861-871.)

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[1] Counsel was heard to cite to pages 874 and 875 of the Administrative Record. These pages, however, address the tape recording of the interrogation which was not at issue at the December 4, 2006, hearing. The matter was addressed on pages 871 and 872 of the Administrative Record but even citing the correct pages fails to resolve the issue in a manner consistent with the evidentiary record.

This Commission made the following finding with regard to interrogations:

> Conducting the interrogation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts. (AR at p. 872. Emphasis added.)

The use of the conjunctive "and" and the plural "requirements" refers to the fact that this Commission found that both the costs of conducting the interrogation during on-duty hours and the costs of paying overtime for off-duty time are reimbursable activities of the mandate.

When the parameters and guidelines were redrafted by Staff, however, this distinction was not just overlooked but was soundly rejected and the specific wording of the Commission's finding in its Statement of Decision was deleted. (AR at p. 912.) As a matter of law, the Statement of Decision is *res judicata* and this Commission cannot reverse itself or change its final decision unless by reconsideration pursuant California Code of Regulations, title 2, section 1188.4, subdivision (b). The record bears out that no request for reconsideration was made prior to the drafting of the parameters and guidelines. Therefore, the language adopted in the parameters and guidelines was an *ultra vires* act and could only be construed as an error. Indeed, even Staff itself concurs on the issue of the finality of the Commission's decisions:

> It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. (Final Staff Analysis (FSA), Item 13, December 4, 2006, hearing at p. 26. Citation omitted.)

Once claims were filed and audits were done, legitimate costs were being disallowed. Upon closer inspection, the error in the parameters and guidelines became apparent and an effort was made to bring this to the attention of this Commission for correction. The effort was buoyed by the legislatively directed reconsideration which the claiming community had anticipated would open the gates to numerous challenges and opportunities to clarify the barely adequate parameters and guidelines.

2. The Reconsideration Did Not Resolve the Interrogation Issue.

On April 26, 2006, this Commission began its review of its prior decision as directed by the Legislature. Interested parties brought forward a plethora of issues to be addressed by the Commission. (Statement of Decision (SOD) at pp. 8-9.) Specifically, the County of Sacramento, the County of Alameda, the County of Los Angeles and the County of Orange each addressed the issue with interrogations directly or touched upon it as part of investigations.

This Commission, however, carefully considered its very limited scope: the applicability of *San Diego Unified v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable decisions[2] to the reimbursable POBOR program. (SOD at pp. 11-12.) After sorting through a number of court cases on point, this Commission addressed the interrogation issue yet did so by only concluding that the ensuing case law did not impinge on its initial decision. (SOD at pp. 35-36.)

So, although having noted for the record that the counties had raised other issues including the issue of the reimbursability of interrogation costs, the matter stood unresolved by the very limited scope of the reconsideration. Yet, this Commission in its decision clearly noted that issues remained unresolved and directed its Staff to look into the establishment of a reasonable reimbursement methodology. (FSA at p. 3.) Since such a methodology requires a bedrock of clearly defined reimbursable activities, the claiming community again sought to bring the errant parameters and guidelines back into alignment with the original statement of decision.

3. The Interrogation Issue Was Properly Before the Commission at the December 4 Hearing.

On June 15, 2006, the County requested to amend the parameters and guidelines. (05-PGA-20) In addition to supporting an already proposed reasonable reimbursement methodology, the County sought again to bring this Commission's attention to the discord between the Statement of Decision and the resulting parameters and guidelines with regard to interrogations. (FSA at pp. 8 and 11 and Exhibit D thereto.)

Staff resolved the issue as follows:

> ...the Commission has already rejected the arguments raised by the County and Cities[3] for reimbursement of investigation costs and the cost to conduct the interrogation. Thus, staff finds that the SCO proposal is consistent with the Commission findings when adopting the parameters and guidelines and the Statement of Decision on reconsideration. (FSA at p. 22.)

This statement, however, does not resolve the issue. Staff failed to recognize that, by their own interpretation of law, the reconsideration could not act as a vehicle to resolve the issue — even though the issue had been duly raised and briefed. Indeed, until the December 4 hearing, the matter had not been addressed by this Commission or its Staff.

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[2] This other decision considered by the Commission was *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, otherwise known as the Kern High School District case.

[3] The County of San Bernardino was joined by the Cities of Los Angeles and Sacramento in pointing out the Commission the error in the parameters and guidelines.

Staff goes on to explain the basis for the earlier decision of the Commission. But, in doing so, Staff misquotes the original decision:

> The Commission's Statement of Decision includes the following reimbursable activity:
>
> > Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
>
> This activity was derived from Government Code section 3303, subdivision (a), which establishes the timing and compensation of a peace officer subject to an interrogation. Section 3303, subdivision (a), requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the normal waking hours of the peace officer, unless the seriousness of the investigation requires otherwise. At the test claim phase, the claimant contended that this section resulted in the payment of overtime to the peace officer employee. (See page 12 of the Commission's Statement of Decision.[4]) (FSA at p. 23. Emphasis added.)

This misquote changes the intent of the original decision and taints the Staff's analysis. In an effort to, again, draw attention to the issue, Bonnie Ter Keurst testified at the December 4 hearing. In her testimony, she quoted the original Statement of Decision language, emphasized that this issue was not addressed in the reconsideration and asked this Commission to make the correction in the parameters and guidelines. Instead of doing so, this Commission relied on statements in the Final Staff Analysis, which were echoed by counsel, and failed to give this issue the attention it deserves.

CONCLUSION

The County has brought before this Commission an important issue regarding an error that requires this Commission's full attention. Due to a misquote of a prior decision and a misstatement of fact, this Commission missed the opportunity to correct its prior error. The County requests this Commission grant its request for a hearing on the merits to reconsider its December 4, 2006, decision on the POBOR program.

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[4] Page 12 of the statement of decision refers to page 871 of the Administrative Record. The misquote, however, is actually found on page 13 of the statement of decision or 872 of the Administrative Record.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 22nd day of December, 2006, at San Bernardino, California, by:

Bonnie Ter Keurst

Bonnie Ter Keurst
Office of the Auditor/Controller-Recorder
County of San Bernardino

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of San Bernardino, and I am over the age of 18 years and not a party to the within action. My place of employment is 222 West Hospitality Lane, San Bernardino, CA 92415-0018

On December 22, 2006, I served:

REQUEST FOR RECONSIDERATION
OF PRIOR FINAL DECISION

On behalf of County of San Bernardino

Government Code sections 3300 through 3310

Claim nos. CSM-4499 and 05-RL-4499-01
05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22

Peace Officer Procedural Bill Of Rights

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at San Bernardino, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 22nd day of December, 2006, at San Bernardino, California.

Deborah Pittenger

Declarant
Deborah Pittenger

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BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	**Case No.: 05-RL-4499-01** ***Peace Officer Procedural Bill of Rights*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 26, 2006)

STATEMENT OF DECISION

The attached Statement of Decision of the Commission on State Mandates is hereby adopted in the above-entitled matter.

Paula Higashi
PAULA HIGASHI, Executive Director

May 1, 2006
Date

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

RECONSIDERATION OF PRIOR STATEMENT OF DECISION ON: Government Code Sections 3300 through 3310 As Added and Amended by Statutes 1976, Chapter 465;Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675 (CSM 4499) Directed by Government Code Section 3313, Statutes 2005, chapter 72, section 6 (Assem. Bill (AB) No. 138), Effective July 19, 2005.	**Case No.: 05-RL-4499-01** ***Peace Officer Procedural Bill of Rights*** STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7 (Adopted on April 26, 2006)

STATEMENT OF DECISION

The Commission on State Mandates ("Commission") heard and decided this test claim during a regularly scheduled hearing on April 26, 2006. Pam Stone, Dee Contreras, and Ed Takach appeared for the City of Sacramento. Lt. Dave McGill appeared for the Los Angeles Police Department. Susan Geanacou appeared for the Department of Finance.

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code section 17500 et seq., and related case law.

The Commission adopted the staff analysis to partially approve the test claim at the hearing by a vote of 5 to 1.

Summary of Findings

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the

United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

On review of this claim pursuant to Government Code section 3313, the Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B,

section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[1] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

BACKGROUND

Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim. Government Code section 3313 states the following:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions. If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted.

Commission's Decision on *Peace Officer Procedural Bill of Rights* (CSM 4499)

The Legislature enacted the Peace Officers Procedural Bill of Rights Act (commonly abbreviated as "POBOR"), by adding Government Code sections 3300 through 3310, in 1976. POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or

[1] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

discipline. Generally, POBOR prescribes certain protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit.[2]

Legislative intent for POBOR is expressly provided in Government Code section 3301 as follows:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California.

POBOR applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[3]

In 1995, the City of Sacramento filed a test claim alleging that POBOR, as it existed from 1976 until 1990, constituted a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.[4] In 1999, the Commission approved the test claim and adopted a Statement of Decision.[5] The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or

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[2] See California Supreme Court's summary of the legislation in *Baggett v. Gates* (1982) 32 Cal.3d 128, 135.

[3] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[4] The POBOR Act has been subsequently amended by the Legislature. (See Stats. 1994, ch. 1259; Stats. 1997, ch. 148; Stats. 1998, ch. 263; Stats. 1998, ch. 786; Stats. 1999, ch. 338; Stats. 2000, ch. 209; Stats. 2002, ch. 1156; Stats. 2003, ch. 876; Stats. 2004, ch. 405; and Stats. 2005, ch. 22.) These subsequent amendments are outside the scope of the Commission's decision in POBOR (CSM 4499), and therefore are *not* analyzed to determine whether they impose reimbursable state-mandated activities within the meaning of article XIII B, section 6.

[5] Administrative Record, page 859.

higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.[6]

On March 29, 2001, the Commission adopted a statewide cost estimate covering fiscal years 1994-1995 through 2001-2002 in the amount of $152,506,000.[7]

Audit by the Bureau of State Audits

The Legislative Analyst's Office (LAO), in its Analysis of the 2002-2003 Budget Bill, reviewed a sample of POBOR reimbursement claims and found that the annual state costs associated with the program was likely to be two to three times higher than the amount projected in the statewide cost estimate and significantly higher than what the Legislature initially expected. LAO projected costs in the range of $50 to $75 million annually.

[6] Administrative Record, page 1273.

[7] Administrative Record, page 1309.

LAO also found a wide variation in the costs claimed by local governments. Thus, LAO recommended that the Legislature refer the POBOR program to the Joint Legislative Audit Committee for review, possible state audit, and possible revisions to the parameters and guidelines.

In March 2003, the Joint Legislative Audit Committee authorized the Bureau of State Audits to conduct an audit of the process used by the Commission to develop statewide cost estimates and to establish parameters and guidelines for the claims related to POBOR.

On October 15, 2003, the Bureau of State Audits issued its audit report, finding that reimbursement claims were significantly higher than anticipated and that some agencies claimed reimbursement for questionable activities.[8] While the Bureau of State Audits recommended the Commission make changes to the overall mandates process, it did not recommend the Commission make any changes to the parameters and guidelines for the POBOR program. The Commission implemented all of the Bureau's recommendations.

On July 19, 2005, the Legislature enacted Government Code section 3313 (Stats. 2005, ch. 72, § 6 (AB 138)) and directed the Commission to "review" the Statement of Decision in POBOR.

Comments Filed Before the Issuance of the Draft Staff Analysis by the City and County of Los Angeles

On October 19, 2005, Commission staff requested comments from interested parties, affected state agencies, and interested persons on the Legislature's directive to "review" the POBOR program. Comments were received from the City of Los Angeles and the County of Los Angeles. The City and County both contend that the Commission properly found that POBOR constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The County further argues that, under the California Supreme Court decision in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, reimbursement must be expanded to include all activities required under the test claim statutes including those procedures required by the federal due process clause. The County of Los Angeles also proposes that the Commission adopt a reasonable reimbursement methodology in the parameters and guidelines to reimburse these claims.

Comments Filed on the Draft Staff Analysis

On February 24, 2006, Commission staff issued the draft staff analysis and requested comments on the draft. The Commission received responses from the following parties:

City of Sacramento

The City of Sacramento argues the following:

- Prior law does not require due process protections for employees receiving short-term suspensions, reclassifications, or reprimands. Therefore, the administrative appeal required by the test claim legislation constitutes a new program or higher

[8] Administrative Record, page 1407 et seq.

level of service when an officer receives a short-term suspension, reclassification, or reprimand.

- Not every termination of a police chief warrants a liberty interest hearing required under prior law. The decision of the Commission should distinguish between those situations where there is a valid right to a liberty interest hearing under principles of due process, from the remaining situations where a police chief is terminated.
- The decision of the Commission should reflect "the onerous requirements imposed when interrogations are handled under POBOR."
- All activities required when an officer receives an adverse comment are reimbursable.

County of Alameda

The County of Alameda states that interrogation of a sworn officer under POBOR is difficult and requires preparation. The County alleges that ten hours of investigation must be conducted before an interview that might take thirty minutes.

County of Los Angeles

The County of Los Angeles contends that investigation is a reimbursable state-mandated activity. The County also argues that, pursuant to the *San Diego Unified School Dist.* case, all due process activities are reimbursable.

County of Orange

The County of Orange believes the staff analysis "does not fully comprehend or account for the [investigation] requirements of interrogation governed by Government Code section 3303." The County contends that the requirements of law enforcement agencies to investigate complaints have correspondingly increased under POBOR. When a complaint is received, the County argues that "every department is called upon to conduct very detailed investigations when allegations of serious misconduct occur. These investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force where injuries may be significant, serious property damage, and criminal behavior." The County also contends that the investigation involves the subject officer and other officer witnesses.

Department of Finance

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> . . . there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire

police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Discussion

The courts have found that article XIII B, section 6 of the California Constitution[9] recognizes the state constitutional restrictions on the powers of local government to tax and spend.[10] "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[11] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or task.[12] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[13]

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[9] Article XIII B, section 6, subdivision (a), (as amended by Proposition 1A in November 2004) provides: "(a) Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service, except that the Legislature may, but need not, provide a subvention of funds for the following mandates: (1) Legislative mandates requested by the local agency affected. (2) Legislation defining a new crime or changing an existing definition of a crime. (3) Legislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to January 1, 1975."

[10] *Department of Finance v. Commission on State Mandates (Kern High School Dist.)* (2003) 30 Cal.4th 727, 735.

[11] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[12] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[13] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878 (*San Diego Unified School Dist.)*; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835-836 (*Lucia Mar*).

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[14] To determine if the program is new or imposes a higher level of service, the test claim legislation must be compared with the legal requirements in effect immediately before the enactment of the test claim legislation.[15] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[16]

Finally, the newly required activity or increased level of service must impose costs mandated by the state.[17]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[18] In making its decisions, the Commission must strictly construe article XIII B, section 6 and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[19]

I. Commission Jurisdiction and Period of Reimbursement for Decision on Reconsideration

It is a well-settled issue of law that administrative agencies, such as the Commission, are entities of limited jurisdiction. Administrative agencies have only the powers that have been conferred on them, expressly or by implication, by statute or constitution. The Commission's jurisdiction in this case is based solely on Government Code section 3313. Absent Government Code section 3313, the Commission would have no jurisdiction to review and reconsider its decision on POBOR since the decision was adopted and issued well over 30 days ago.[20]

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[14] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874, (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; *Lucia Mar, supra,* 44 Cal.3d 830, 835.)

[15] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra*, 44 Cal.3d 830, 835.

[16] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[17] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[18] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551, 17552.

[19] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

[20] Government Code section 17559.

Thus, the Commission must act within the jurisdiction granted by Government Code section 3313, and may not substitute its judgment regarding the scope of its jurisdiction on reconsideration for that of the Legislature.[21] Since an action by the Commission is void if its action is in excess of the powers conferred by statute, the Commission must narrowly construe the provisions of Government Code section 3313.

Government Code section 3313 provides:

> In the 2005-06 fiscal year, the Commission on State Mandates shall review its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim and make any modifications necessary to this decision *to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in San Diego Unified School Dist. v. Commission on State Mandates (2004) 33 Cal.4th 859 and other applicable court decisions.* If the Commission on State Mandates revises its statement of decision regarding the Peace Officer Procedural Bill of Rights test claim, the revised decision shall apply to local government Peace Office Procedural Bill of Rights activities occurring after the date the revised decision is adopted. (Emphasis added.)

The Commission's jurisdiction on review is limited by Government Code section 3313, to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist.* ... and other applicable court decisions."

In addition, Government Code section 3313 states that "the revised decision shall apply to local government Peace Officer Procedural Bill of Rights activities *occurring after the date the revised decision is adopted.*" Thus, the Commission finds that the decision adopted by the Commission on this reconsideration or "review" of POBOR applies to costs incurred and claimed for the 2006-2007 fiscal year.

II. Is the test claim legislation subject to article XIII B, section 6 of the California Constitution?

In 1999, the Commission found that the test claim legislation mandates law enforcement agencies to take specified procedural steps when investigating or disciplining a peace officer employee.[22] The Commission found that Government Code section 3304 mandates, under specified circumstances, that "no punitive action ['any action that may lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment'], nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

The Commission also found that the following activities are mandated by Government Code section 3303 when the employer wants to interrogate an officer:

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[21] *Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 346-347.

[22] Original Statement of Decision (AR, p. 862).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Providing the peace officer employee with access to a tape recording of his or her interrogation prior to any further interrogation at a subsequent time, as specified. (Gov. Code, § 3303, subd. (g).)
- Under specified circumstances, producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons when requested by the officer. (Gov. Code, § 3303, subd. (g).)

Finally, Government Code sections 3305 and 3306 provide that no peace officer shall have any adverse comment entered into the officer's personnel file without having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact shall be noted on the document and signed or initialed by the peace officer. In addition, the peace officer shall have 30 days to file a written response to any adverse comment entered into the personnel file. The Commission found that Government Code sections 3305 and 3306 impose the following requirements on employers before an adverse comment is placed in an officer's personnel file:

- To provide notice of the adverse comment to the officer.
- To provide an opportunity to review and sign the adverse comment.
- To provide an opportunity to respond to the adverse comment within 30 days.
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

POBOR, by the terms set forth in Government Code section 3301, expressly applies to counties, cities, school districts, and special districts and the Commission approved the test claim for these local entities. Government Code section 3301 states the following: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5 of the Penal Code." The legislation, however, does not apply to reserve or recruit officers,[23] coroners, or railroad police officers commissioned by the Governor.

Government Code section 3313 requires the Commission to review these findings to clarify whether the subject legislation imposes a mandate consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.

[23] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569.

Generally, in order for test claim legislation to impose a reimbursable state-mandated program, the statutory language must mandate an activity or task on local governmental entities. If the statutory language does not impose a mandate, then article XIII B, section 6 of the California Constitution is not triggered and reimbursement is not required.

In the present case, although the procedural rights and protections afforded a peace officer under POBOR are expressly required by statute, the required activities are not triggered until the employing agency makes certain local decisions. For example, in the case of a city or county, agencies that are required by the Constitution to employ peace officers,[24] the POBOR activities are not triggered until the city or county decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file. These initial decisions are not expressly mandated by state law, but are governed by local policy, ordinance, city charter, or memorandum of understanding.[25]

In the case of a school district or special district, the POBOR requirements are not triggered until the school district or special district (1) decides to exercise the statutory authority to employ peace officers, and (2) decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

After the Commission issued its decision in this case, two California Supreme Court decisions were decided that address the "mandate" issue; *Kern High School Dist.* and *San Diego Unified School Dist.*[26] Thus, based on the court's ruling in these cases, the issue is whether the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 in light of the local decisions that trigger the POBOR requirements.

As described below, the Legislature expressly declared its intent that the POBOR legislation is a matter of statewide concern and was designed to assure that effective police protection services are provided to all people of the state. The California Supreme Court found that POBOR protects the health, safety, and welfare of the citizens. Thus,

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[24] Article XI of the California Constitution provides for the formation of cities and counties. Section 1, Counties, states that the Legislature shall provide for an elected county sheriff. Section 5, City charter provision, specifies that city charters are to provide for the "government of the city police force."

[25] See *Baggett v. Gates* (1982) 32 Cal.3d 128, 137-140, where the California Supreme Court determined that POBOR *does not* (1) interfere with the setting of peace officers' compensation, (2) regulate qualifications for employment, (3) regulate the manner, method, times, or terms for which a peace officer shall be elected or appointed, nor does it (4) affect the tenure of office or purpose to regulate or specify the causes for which a peace officer can be removed. These are local decisions. But the court found that POBOR impinges on the city's implied power to determine the *manner* in which an employee can be disciplined.

[26] *Kern High School Dist., supra*, 30 Cal.4th 727; *San Diego Unified School Dist., supra*, 33 Cal.4th 859.

based on the facts of this case, the Commission finds that the Supreme Court's decision in *San Diego Unified School Dist.* supports the Commission's original finding that the test claim legislation constitutes a state-mandated program for cities, counties, school districts, and special districts as described below.

A. POBOR constitutes a state-mandated program even though a local decision is first made to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file.

The procedural rights and protections afforded a peace officer under POBOR are required by statute. The rights are not triggered, however, until the employing agency decides to interrogate an officer, take punitive action against the officer, or place an adverse comment in an officer's personnel file. These initial decisions are not mandated by the state, but are governed by local policy, ordinance, city charter, or a memorandum of understanding.

Nevertheless, based on findings made by the California Supreme Court regarding the POBOR legislation and in *San Diego Unified School Dist.*, the Commission finds that the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

After the Commission issued its Statement of Decision in this case, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[27] In *Kern High School Dist.*, school districts requested reimbursement for notice and agenda costs for meetings of their school site councils and advisory bodies. These bodies were established as a condition of various education-related programs that were funded by the state and federal government.

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[28] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[29]

The court also reviewed and affirmed the holding of *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, determining that, when analyzing state-mandate claims, the Commission must look at the underlying program to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[30] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a

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[27] *Kern High School Dist., supra*, 30 Cal.4th 727.

[28] *Id.* at page 737.

[29] *Ibid.*

[30] *Id.* at page 743.

> reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate. (Emphasis in original.)[31]

Thus, the Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][32]

Based on the plain language of the statutes creating the underlying education programs in *Kern High School Dist.*, the court determined that school districts were not legally compelled to participate in eight of the nine underlying programs.[33]

The school districts in *Kern High School Dist.*, however, urged the court to define "state mandate" broadly to include situations where participation in the program is coerced as a result of severe penalties that would be imposed for noncompliance. The court previously applied such a broad construction to the definition of a federal mandate in the case of *City of Sacramento v. State* (1990) 50 Cal.3d 51, 74, where the state's failure to comply with federal legislation that extended mandatory coverage under the state's unemployment insurance law would result in California businesses facing "a new and serious penalty – full, double unemployment taxation by both state and federal governments."[34] Although the court in *Kern High School Dist.* declined to apply the reasoning in *City of Sacramento* that a state mandate may be found in the absence of strict legal compulsion on the facts before it in *Kern*, after reflecting on the purpose of article XIII B, section 6 – to preclude the state from shifting financial responsibilities onto local agencies that have limited tax revenue– the court stated:

> In light of that purpose, we do not foreclose the possibility that a reimbursable state mandate under article XIII B, section 6, properly might be found in some circumstances in which a local entity is not legally compelled to participate in a program that requires it to expend additional funds.[35]

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[31] *Ibid.*

[32] *Id.* at page 731.

[33] *Id.* at pages 744-745.

[34] *City of Sacramento, supra*, 50 Cal.3d 51, 74.

[35] *Kern High School Dist., supra*, 30 Cal.4th 727, 752.

Thus, the court in *Kern* recognized that there could be a case, based on its facts, where reimbursement would be required under article XIII B, section 6 in circumstances where the local entity was not legally compelled to participate in a program.

One year later, the Supreme Court revisited the "mandate" issue in *San Diego Unified School Dist.*, a case that addressed a challenge to a Commission decision involving a school district's expulsion of a student. The school district acknowledged that under specified circumstances, the statutory scheme at issue in the case gave school districts discretion to expel a student. The district nevertheless argued that it was mandated to incur the costs associated with the due process hearing required by the test claim legislation when a student is expelled. The district argued that "although any particular expulsion recommendation may be discretionary, as a practical matter it is inevitable that some school expulsions will occur in the administration of any public school program" and, thus, the ruling in *City of Merced* should not apply.[36]

In *San Diego Unified School Dist.*, the Supreme Court did not overrule the *Kern* or *City of Merced* cases, but stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[37] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] the court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence

[36] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887.

[37] *Id.* at page 887.

> we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[38]

Ultimately, however, the court did not resolve the issue regarding the application of the *City of Merced* case to the discretionary expulsions, and resolved the case on alternative grounds.[39]

In the present case, the purpose of POBOR, as stated in Government Code section 3301, is to assure that stable employment relations are continued throughout the state and to further assure that effective law enforcement services are provided to all people of the state. The Legislature declared POBOR a matter of statewide concern.

In 1982, the California Supreme Court addressed the POBOR legislation in *Baggett v. Gates*.[40] In *Baggett*, the City of Los Angeles received information that certain peace officer employees were engaging in misconduct during work hours. The city interrogated the officers and reassigned them to lower paying positions (a punitive action under POBOR). The employees requested an administrative appeal pursuant to the POBOR legislation and the city denied the request, arguing that charter cities cannot be constitutionally bound by POBOR. The court acknowledged that the home rule provision of the Constitution gives charter cities the power to make and enforce all ordinances and regulations, subject only to the restrictions and limitations provided in the city charter. Nevertheless, the court found that the City of Los Angeles was required by the POBOR legislation to provide the opportunity for an administrative appeal to the officers.[41] In reaching its conclusion, the court relied, in part, on the express language of legislative intent in Government Code section 3301 that the POBOR legislation is a "matter of statewide concern."[42]

The court in *Baggett* also concluded that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the city, which would extend far beyond local boundaries.

> Finally, it can hardly be disputed that the maintenance of stable employment relations between police officers and their employers is a matter of statewide concern. The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create a clear and present threat not only to the health, safety, and welfare of the citizens of the city, but also to the hundreds, if not thousands, of nonresidents who daily visit there. Its effect would also be felt by the many nonresident owners of property and businesses located within the city's borders. Our society is no longer a

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[38] *Id.* at pages 887-888.

[39] *Id.* at page 888.

[40] *Baggett v. Gates* (1982) 32 Cal.3d 128.

[41] *Id.* at page 141.

[42] *Id.* at page 136.

> collection of insular local communities. Communities today are highly interdependent. The inevitable result is that labor unrest and strikes produce consequences which extend far beyond local boundaries.[43]

Thus, the court found that "the total effect of the POBOR legislation is not to deprive local governments of the right to manage and control their police departments but to secure basic rights and protections to a segment of public employees who were thought unable to secure them for themselves."[44]

In 1990, the Supreme Court revisited the POBOR legislation in *Pasadena Police Officers Assn. v. City of Pasadena (Pasadena)*.[45] The *Pasadena* case addressed the POBOR requirement in Government Code section 3303 to require the employer to provide an officer subject to an interrogation with any reports or complaints made by investigators. In the language quoted below, the court described the POBOR legislation and recognized that the public has a high expectation that peace officers are to be held above suspicion of violation of the laws they are sworn to enforce. Thus, in order to maintain the public's confidence, "a law enforcement agency *must* promptly, thoroughly, and fairly investigate allegations of officer misconduct ... [and] institute disciplinary proceedings." (Emphasis added.)

> Courts have long recognized that, while the off-duty conduct of employees is generally of no legal consequence to their employers, the public expects peace officers to be "above suspicion of violation of the very laws they are sworn ... to enforce." [Citations omitted.] Historically, peace officers have been held to a higher standard than other public employees, in part because they alone are the "guardians of peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them." [Citation omitted.] To maintain the public's confidence in its police force, a law enforcement agency must promptly, thoroughly, and fairly investigate allegations of officer misconduct; if warranted, it must institute disciplinary proceedings.[46]

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 "for the simple reason" that the local entity's ability to decide who to discipline and when "could control or perhaps even avoid the extra costs" of the POBOR legislation.[47] But a local entity does not decide who to investigate or discipline based on the costs incurred to the entity. The decision is made, as indicated by the Supreme Court, to maintain the public's confidence in its police force and to protect the health, safety,

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[43] *Id.* at page 139-140.

[44] *Id.* at page 140.

[45] *Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564.

[46] *Id.* at page 571-572.

[47] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888.

and welfare of its citizens. Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a mandated program would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[48] Moreover, the POBOR legislation implements a state policy to maintain stable employment relations between police officers and their employers to "assure that effective services are provided to all people of the state." POBOR, therefore, carries out the governmental function of providing a service to the public, and imposes unique requirements on local agencies to implement the state policy.[49] Thus, a finding that the test claim legislation does not impose a state-mandated program contravenes the purpose of article XIII B, section 6 "to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill-equipped' to assume increased financial responsibilities" due to the tax and spend provisions of articles XIII A and XIII B.[50]

Accordingly, even though local decisions are first made to interrogate an officer, take punitive action against the officer, or to place an adverse comment in an officer's personnel file, the Commission finds, based on *San Diego Unified School Dist.* and the facts presented in this case, that POBOR constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution.

B. POBOR constitutes a state-mandated program for school districts and for special districts identified in Government Code section 3301 that employ peace officers.

Government Code section 3301, the statute that identifies the peace officers afforded the rights and protections granted in the POBOR legislation, expressly includes peace officers employed by school districts and community college districts pursuant to Penal Code section 830.32. Penal Code section 830.32 provides that members of a school district and community college district police department appointed pursuant to Education Code sections 39670 and 72330 are peace officers if the primary duty of the officer is the enforcement of law as prescribed by Education Code sections 39670 (renumbered section 38000) and 72330, and the officers have completed an approved course of training prescribed by the Commission on Peace Officer Standards and Training (POST) before exercising the powers of a peace officer.

POBOR also applies to special districts authorized by statute to maintain a police department, including police protection districts, harbor or port police, transit police, peace officers employed by the San Francisco Bay Area Rapid Transit District (BART),

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[48] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

[49] *San Diego Unified School, supra*, 33 Cal.4th at page 874.

[50] *Id.* at page 888, fn. 23.

peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.[51]

While counties and cities are mandated by the California Constitution to employ peace officers,[52] school districts and special districts are not expressly required by the state to employ peace officers. School districts and special districts have statutory authority to employ peace officers.

Following the Supreme Court's decision in *Kern High School Dist.*, the Commission denied school district test claims addressing peace officer employees on the ground that school districts are not mandated by state law to have a police department and employ peace officers. In these decisions, the Commission acknowledged the provision in the Constitution (Cal. Const., art. 1, § 28, subd. (c)) that requires K-12 school districts to maintain safe schools. The Commission found, however, that there is no constitutional or statutory requirement to maintain safe schools through school security or a school district police department. Moreover, school districts have governmental immunity under Government Code section 845 and cannot be liable for civil damages for "failure to establish a police department or otherwise to provide police protection service or, if police protection service is provided, for failure to provide sufficient police protection service."[53] Comments on Government Code section 845 by the Law Revision Commission state that the immunity was enacted by the Legislature to prevent judges and juries from removing the ultimate decision-making authority regarding police protection from those (local governments) that are politically responsible for making the decision.[54]

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[51] Government Code section 3301; Penal Code section 830.1, subdivision (a) ["police officer of a district (including police officers of the San Diego Unified Port District Harbor Police) authorized by statute to maintain a police department"]; Penal Code section 830.31, subdivision (d) ["A housing authority patrol officer employed by the housing authority of a ... district ..."]; Penal Code section 830.33 ["(a) A member of the San Francisco Bay Area Rapid Transit District Police Department appointed pursuant to Section 28767.5 of the Public Utilities Code ... (b) Harbor or port police regularly employed and paid ... by a ... district ... (c) Transit police officers or peace officers of a ... district ... (d) Any person regularly employed as an airport law enforcement officer by a ... district ..."; and Penal Code section 830.37 ["(a) Members of an arson-investigating unit ... of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers is the detection and apprehension of persons who have violated any fire law or committed insurance fraud ...(b) Members ... regularly paid and employed in that capacity, of a fire department or fire protection agency of a ... district ... if the primary duty of these peace officers ... is the enforcement of law relating to fire prevention or fire suppression."

[52] See ante, footnote 21.

[53] See *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448.

[54] 4 California Law Revision Commission Reports 801 (1963).

Immunity under Government Code section 845 also applies to community college districts and special districts.[55]

Thus, based on the Supreme Court's holding in *Kern High School Dist.*, past decisions of the Commission have determined that local entities, such as school districts, are not entitled to reimbursement for activities required by the state when the activities are triggered by the discretionary local decision to employ peace officers.

This case presents different facts, however. Here, unlike the other cases, the Legislature expressly stated in Government Code section 3301 that POBOR is a matter of statewide concern and found that it was necessary to apply the legislation to all public safety officers, as defined. Government Code section 3301 states the following:

> The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, wherever situated within the State of California.

Legislative declarations of policy are entitled to great weight by the courts "and it is not the duty or prerogative of the courts to interfere with such legislative finding unless it clearly appears to be erroneous and without reasonable foundation."[56]

Furthermore, in *San Diego Unified School Dist.*, the Supreme Court acknowledged the school district's argument that the due process hearing procedures were mandated when the district exercised its discretion and expelled a student, despite the *City of Merced* and *Kern* cases. The court stated the following:

> Indeed, the Court of Appeal below suggested that the present case is distinguishable from *City of Merced* [citation omitted], in light of article I, section 28, subdivision (c), of the state Constitution. That constitutional subdivision, part of Proposition 8 (known as the Victim's Bill of Rights initiative, adopted by the voters at the Primary Election in June 1982), states: "All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure, and peaceful." The Court of Appeal below concluded: "In light of a school district's constitutional obligation to provide a safe educational environment ..., the incurring [due process] hearing costs ... cannot properly be viewed as a nonreimbursable 'downstream' consequence of a decision to seek to expel a student under

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[55] *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799; *Hernandez v. Southern California Rapid Transit Dist.* (1983) 142 Cal.App.3d 1063.

[56] *Paul v. Eggman* (1966) 244 Cal.App.2d 461, 471-472.

> Education Code section 48915's discretionary provision for damaging or stealing school or private property, receiving stolen property, engaging in sexual harassment or hate violence, or committing other specified acts of misconduct ... that warrant such expulsion."[57]

In response, the Supreme Court stated that "[u]pon reflection, we agree with the District and amici curiae that there is reason to question an extension of the holding of *City of Merced* so as to preclude reimbursement under article XIII B, section 6 of the state Constitution and Government Code section 17514, whenever an entity makes an initial discretionary decision that in turn triggers mandated costs."[58] The court explained as follows:

> Indeed, it would appear that under a strict application of the language of *City of Merced*, public entities would be denied reimbursement for state-mandated costs in apparent contravention of the intent underlying article XIII B, section 6 of the state Constitution and Government Code section 17514 and contrary to past decisions in which it has been established that reimbursement was in fact proper. For example, in *Carmel Valley* [citation omitted] an executive order requiring that county firefighters be provided with protective clothing and safety equipment was found to create a reimbursable state mandate for the added costs of such clothing and equipment. [Citation omitted.] The court in *Carmel Valley* apparently did not contemplate that reimbursement would be foreclosed in that setting merely because a local agency possessed discretion concerning how many firefighters it would employ – and hence, in that sense, could control or perhaps even avoid the extra costs to which it would be subjected. Yet, under a strict application of the rule gleaned from *City of Merced* [citation omitted], such costs would not be reimbursable for the simple reason that the local agency's decision to employ firefighters involves an exercise of discretion concerning, for example, how many firefighters are needed to be employed, etc. We find it doubtful that the voters who enacted article XIII B, section 6, or the Legislature that adopted Government Code section 17514, intended that result, and hence we are reluctant to endorse, in this case, an application of the rule of *City of Merced* that might lead to such result.[59]

The Department of Finance contends that the *San Diego Unified School Dist.* case does not support the finding that the test claim legislation constitutes a reimbursable state-mandated program for school districts. Finance acknowledges the language in *San Diego Unified School Dist.* declining to extend the *City of Merced* decision to preclude reimbursement whenever any entity makes a discretionary decision that triggers mandated costs. Finance argues, however, that the Supreme Court's findings are not

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[57] *San Diego Unified School Dist., supra,* 33 Cal.4th at page 887, footnote 22.

[58] *Id.* at page 887.

[59] *Id.* at pages 887-888.

applicable to school districts since there is no requirement in law for school districts to form a police department. Finance states the following:

> In the *Carmel Valley Fire Protection District* case ((1987) 190 Cal.App.3d 521), unlike the situation here, the fire districts did not have the option to form a fire department and hire firefighters. In fact, the *San Diego Unified School Dist.* case cited *Carmel Valley* to make it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government." (*San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887-888, *Carmel Valley Fire Protection Dist., supra*, 190 Cal.App.3d 521, 537). Such is not the case for school districts and community college districts.
>
> As stated above, there is no requirement in law for these districts to form a police department and safe schools can be maintained without the need to hire police officers as is evidenced by the many school districts that do not have police departments. The fact that the Legislature has declared it necessary for POBOR to apply to all public safety officers is not the same as requiring their hiring in the first place. School districts could, indeed, control or even avoid the extra cost of the POBOR legislation by not forming a police department at all, which is materially different from fire protection services that must be provided by fire protection districts. POBOR activities that might be claimed by school districts are, instead, analogous to non-reimbursable activities in the *Department of Finance v. Commission on State Mandates [Kern High School Dist.]* case that flowed from an underlying exercise of discretion and those in past Commission decisions that denied reimbursement to school districts for other peace officer activities.

Finance, in response to the draft staff analysis, makes no comments with respect to special districts that also have the authority, but are not required, to employ peace officers.[60] At the hearing, however, Finance argued that its comments apply equally to special districts.

The Commission disagrees with the Department of Finance. The fire protection districts in *Carmel Valley* were not mandated by the state to be formed, as asserted by Finance. Fire protection districts are established either by petition of the voters or by a resolution adopted by the legislative body of a county or city within the territory of the proposed district. Once a petition has been certified or a resolution adopted, the local agency

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[60] See, for example, Public Utilities Code section 28767.5, which authorizes BART to employ peace officers:

> The district may employ a suitable security force. The employees of the district that are designated by the general manager as security officers shall have the authority and powers conferred by Section 830.9 of the Penal Code upon peace officers. The district shall adhere to the standards for recruitment and training of peace officers established by the Commission on Peace Officer Standards and Training ...

formation commission must approve the formation of the district "with or without amendment, wholly, partially, or conditionally." A local election is then held and the district is created if a majority of the votes are cast in favor of forming the district.[61] Furthermore, the implication that the phrase "local government" in the *Carmel Valley* case excludes school districts is wrong. "Local government" is specifically defined in article XIII B, section 8 of the Constitution to include school districts and special districts. The definitions in article XIII B, section 8 apply to the mandate reimbursement provisions of section 6. Article XIII B, section 8 states in relevant part the following:

> As used in this article and except as otherwise expressly provided herein:
>
> (d) "Local government" means any city, county, city and county, school district, special district, authority, or other political subdivision of or within the state.

Therefore, the arguments raised by the Department of Finance do not resolve the issue. The Supreme Court in *San Diego Unified School Dist.* did not resolve the issue either. Rather, the court stated the following:

> In any event, we have determined that we need not address in this case the problems posed by such an application of the rule articulated in *City of Merced,* because this aspect of the present case can be resolved on an alternative basis.[62]

Thus, the Commission has the difficult task of resolving the issue for purposes of this claim. For the reasons below, the Commission finds that the POBOR legislation constitutes a state-mandated program for school districts and the special districts identified in Government Code section 3301 that employ peace officers.

Under a strict application of the *City of Merced* case, the requirements of the POBOR legislation would not constitute a state-mandated program within the meaning of article XIII B, section 6 for school districts and the special districts that employ peace officers "for the simple reason" that the ability of the school district or special district to decide whether to employ peace officers "could control or perhaps even avoid the extra costs" of the POBOR legislation.[63] But here, the Legislature has declared that, as a matter of statewide concern, it is necessary for POBOR to apply to all public safety officers, as defined in the legislation. As previously indicated, the California Supreme Court concluded that the peace officers identified in Government Code section 3301 of the POBOR legislation provide an "essential service" to the public and that the consequences of a breakdown in employment relations between peace officers and their employers would create a clear and present threat to the health, safety, and welfare of the citizens of the state.[64]

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[61] Health and Safety Code sections 13815 et seq.

[62] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888.

[63] *Ibid.*

[64] *Baggett, supra*, 32 Cal.3d 128, 139-140.

In addition, in 2001, the Supreme Court determined that school districts, apart from education, have an "obligation to protect pupils from other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern." The court further held that California fulfills its obligations under the safe schools provision of the Constitution (Cal. Const., art. I, § 28, subd. (c)) by permitting local school districts to establish a police or security department to enforce rules governing student conduct and discipline.[65] The arguments by the school districts regarding the safe schools provision of the Constitution caused the Supreme Court in *San Diego Unified School Dist.* to question the application of the *City of Merced* case.[66]

The Legislature has also recognized the essential services provided by special district peace officers in Government Code section 53060.7. The special districts identified in that statute (Bear Valley Community Services District, Broadmoor Police Protection District, Kensington Police Protection and Community Services District, Lake Shastina Community Services District, and Stallion Springs Community Services District) "wholly supplant the law enforcement functions of the county within the jurisdiction of that district."

Thus, as indicated by the Supreme Court in *San Diego Unified School Dist.*, a finding that the POBOR legislation does not constitute a state-mandated program for school districts and special districts identified in Government Code section 3301 would conflict with past decisions like *Carmel Valley*, where the court found a mandated program for providing protective clothing and safety equipment to firefighters and made it clear that "[p]olice and fire protection are two of the most essential and basic functions of local government."[67] The constitutional definition of "local government" for purposes of article XIII B, section 6 includes school districts and special districts. (Cal. Const., art. XIII B, § 8.)

Accordingly, the Commission finds that POBOR constitutes a state-mandated program for school districts that employ peace officers. The Commission further finds that POBOR constitutes a state-mandated program for the special districts identified in Government Code section 3301. These districts include police protection districts, harbor or port police, transit police, peace officers employed by airport districts, peace officers employed by a housing authority, and peace officers employed by fire protection districts.

III. Does the test claim legislation constitute a new program or higher level of service and impose costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514?

Government Code section 3313 requires the Commission to review its previous findings to clarify whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme

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[65] *In re Randy G.* (2001) 26 Cal.4th 556, 562-563.

[66] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 887, fn. 22.

[67] *Id.* at pages 887-888; *Carmel Valley Fire Protection Dist. v. State* (1987) 190 Cal.App.3d 521, 537.

Court Decision in *San Diego Unified School Dist.* and other applicable court decisions. The test claim legislation will impose a new program or higher level of service, and costs mandated by the state when it compels a local entity to perform activities not previously required, and results in actual increased costs mandated by the state. [68] In addition, none of the exceptions to reimbursement found in Government Code section 17556 can apply. The activities found by the Commission to be mandated are analyzed below.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary,[69] written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[70] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[71]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[72] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the

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[68] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar Unified School Dist., supra*, 44 Cal.3d 830, 835.

[69] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[70] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[71] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[72] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

test claim legislation based on the source of the report, its contents, and its potential impact on the career of the officer.[73]

Thus, under Government Code section 3304, as it existed when the Statement of Decision was adopted, the employer is required to provide the opportunity for an administrative appeal to permanent, at-will or probationary peace officers for any action leading to the following actions:

- Dismissal.
- Demotion.
- Suspension.
- Reduction in salary.
- Written reprimand.
- Transfer for purposes of punishment.
- Denial of promotion on grounds other than merit.
- Other actions against the employee that results in disadvantage, harm, loss or hardship and impacts the career opportunities of the employee.

The test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local entity.[74] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with due process standards.[75, 76]

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[73] *Id* at p. 353-354.

[74] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806.

[75] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304.

[76] At least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250. In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.) A hearing before the Chief of Police was found to be appropriate within the meaning of Government Code section 3304 in a case involving a written reprimand since the Chief of Police was not in any way involved in the investigation and the employee and his attorney had an opportunity to present evidence and set forth arguments on the employee's behalf. (*Stanton, supra*, 226 Cal.App,3d 1438, 1443.)

Finally, the courts have been clear that the administrative hearing required by Government Code section 3304 does *not* mandate an investigatory process. "It is an adjudicative process by which the [peace officers] hope to restore their reputations" and where "the reexamination [of the employer's decision] must be conducted by someone who has not been involved in the initial determination."[77]

In 1999, the Commission concluded that under certain circumstances, the administrative appeal required by the POBOR legislation was already required to be provided by the due process clause of the United States and California Constitutions when an action by the employer affects an employee's property interest or liberty interest. A permanent employee with civil service protection, for example, has a property interest in the employment position if the employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Under these circumstances, the permanent employee is entitled to a due process hearing.[78]

In addition, the due process clause applies when the charges supporting a dismissal of a probationary or at-will employee harms the employee's reputation and ability to find future employment. [79] For example, an at-will employee, such as the chief of police, is entitled to a liberty interest hearing (or name-clearing hearing) under the state and federal constitutions when the dismissal is supported by charges of misconduct, mismanagement, and misjudgment – all of which "stigmatize [the employee's] reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration."[80] In *Williams v. Department of Water and Power*, a case cited by the City of Sacramento, the court explained that the right to a liberty interest hearing arises in cases involving moral turpitude. There is no constitutional right to a liberty interest hearing when an at-will employee is removed for incompetence, inability to get along with others, or for political reasons due to a change of administration.

> The mere fact of discharge from public employment does not deprive one of a liberty interest hearing. [Citations omitted.] Appellant must show her dismissal was based on charges of misconduct which "stigmatize" her reputation or "seriously impair" her opportunity to earn a living. [Citations omitted.] ... "Nearly any reason assigned for dismissal is likely to be to some extent a negative reflection on an individual's ability, temperament, or character. [Citation omitted.] But not every dismissal assumes a constitutional magnitude." [Citation omitted.]
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> The leading case of *Board of Regents v. Roth* (1972) 408 U.S. 564, 574 [unofficial cite omitted] distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and other charges such as incompetence or inability to get along with coworkers which does not. The Supreme Court recognized that where "a person's good name,

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[77] *Caloca v. County of San Diego* (2002) 102 Cal.App.4th 433, 443-444 and 447-448.

[78] See original Statement of Decision (AR, p. 864).

[79] See original Statement of Decision (AR, pp. 863-866, 870).

[80] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1807.

> reputation, honor or integrity is at stake" his right to liberty under the Fourteenth Amendment is implicated and deserves constitutional protection. [Citation omitted.] "In the context of *Roth*-type cases, a charge which infringes one's liberty can be characterized as an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence is likely to have severe repercussions of which primarily affect professional life, and which may well force the individual down one or more notches in the professional hierarchy." [Citation omitted.][81]

Thus, the Commission found that, when a hearing was required by the due process clause of the state and federal constitutions, the activity of providing the administrative appeal did not constitute new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Commission found that the administrative appeal constitutes a new program or higher level of service, and imposes costs mandated by the state, in those situations where the due process clause of the United States and California Constitutions did not apply. These include the following:

- Dismissal, demotion, suspension, salary reduction or written reprimand received by *probationary and at-will employees* whose liberty interest *are not* affected (i.e.; the charges do not harm the employee's reputation or ability to find future employment).
- Transfer of permanent, probationary and at-will employees for purposes of punishment.
- Denial of promotion for permanent, probationary and at-will employees for reasons other than merit.
- Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

As noted by the Commission in the Statement of Decision and parameters and guidelines, the Legislature amended Government Code section 3304 in 1998 by limiting the right to an administrative appeal to only those peace officers "who [have] successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.) Thus, as of January 1, 1999, providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) is no longer a reimbursable state-mandated activity.

Thus, the issue is whether the activity of providing the opportunity for an administrative appeal is reimbursable under current law when (1) permanent peace officer employees are subject to punitive actions, as defined in Government Code section 3303, or denials of promotion on grounds other than merit; and when (2) a chief of police is subject to removal.

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[81] *Williams v. Department of Water and Power* (1982) 130 Cal.App.3d 677, 684-685.

As indicated above, under prior law, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process liberty interest hearing under prior law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment. The County of Los Angeles argues, however, that under the California Supreme Court decision in *San Diego Unified School District*, reimbursement must be expanded to include all activities required under the test claim statute, including those procedures previously required by the due process clause. A close reading of the *San Diego Unified School District* case, however, shows that it does not support the County's position.

The County relies on the Supreme Court's analysis on pages 879 (beginning under the header "2. Are the hearing costs state-mandated?") through page 882 of the *San Diego Unified School District* case. There, the court addressed two test claim statutes: Education Code section 48915, which *mandated* the school principal to immediately suspend and recommend the expulsion of a student carrying a firearm or committing another specified offense; and Education Code section 48918, which lays out the due process hearing requirements once the mandated recommendation is made to expel the student. The court recognized that the expulsion recommendation required by Education Code section 48915 was mandated "in that it establishes conditions under which the state, rather than local officials, has made the decision requiring a school district to incur the costs of an expulsion hearing.[82] The Commission and the state, relying on Government Code section 17556, subdivision (c), argued, however, that the district's costs are reimbursable only if, and to the extent that, hearing procedures set forth in Education Code section 48918 exceed the requirements of federal due process.[83] The court disagreed. The court based its conclusion on the fact that the expulsion decision mandated by Education Code 48915, which triggers the district's costs incurred to comply with due process hearing procedures, did not implement a federal law. Thus, the court concluded that all costs incurred that are triggered by the state-mandated expulsion, including those that satisfy the due process clause, are fully reimbursable. The court's holding is as follows:

> [W]e cannot characterize any of the hearing costs incurred by the District, triggered by the mandatory provision of Education Code section 48915, as constituting a federal mandate (and hence being nonreimbursable). We conclude that under the statutes existing at the time of the test claim in this case (state legislation in effect through mid-1994), all such hearing costs – those designed to satisfy the minimum requirements of federal due process, and those that may exceed those requirements – are, with respect

[82] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 880.

[83] *Ibid.*

to the mandatory expulsion provision of section 48915, state mandated costs, fully reimbursable by the state.[84]

The POBOR legislation is different. The costs incurred to comply with the administrative appeal are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to take punitive action, or deny a promotion on grounds other than merit against a peace officer employee. Therefore, the Commission finds that the court's holding, authorizing reimbursement for *all* due process hearing costs triggered by a state-mandated event, does not apply to this case.

Rather, what applies from the *San Diego Unified School Dist.* decision to the administrative appeal activity mandated by Government Code section 3304 is the court's holding regarding discretionary expulsions. In the *San Diego* case, the court analyzed the portion of Education Code section 48915 that provided the school principal with the discretion to recommend that a student be expelled for specified conduct. If the recommendation was made and the district accepted the recommendation, then the district was required to comply with the mandatory due process hearing procedures of Education Code section 48918.[85] In this situation, the court held that reimbursement for the procedural hearing costs triggered by a local discretionary decision to seek an expulsion was not reimbursable because the hearing procedures were adopted to implement a federal due process mandate.[86] The court found that the analysis by the Second District Court of Appeal in *County of Los Angeles v. Commission on State Mandates* (*County of Los Angeles II*) was instructive.[87] In the *County of Los Angeles II* case, the court determined that even in the absence of the test claim statute, counties would be still be responsible for providing services under the constitutional guarantees of federal due process.[88]

This analysis applies here. As indicated above, permanent employees were already entitled to an administrative hearing pursuant to the due process clause of the United States and California Constitutions if they were subject to the following punitive actions: dismissal, demotion, suspension, reduction in salary, or a written reprimand. In addition, an at-will employee, such as the chief of police, was entitled to a due process hearing under prior state and federal law if the charges supporting the dismissal constitute moral turpitude that harms the employee's reputation and ability to find future employment.

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[84] *Id.* at pages 881-882.

[85] *San Diego Unified School Dist., supra*, 33 Cal.4th at pages 884-890.

[86] *Id.* at page 888.

[87] *Id.* at page 888-889; *County of Los Angeles v. Commission on State Mandates* (1995) 32 Cal.App.4th 805. The test claim statute in *County of Los Angeles* required counties to provide indigent criminal defendants with defense funds for ancillary investigation services for capital murder cases. The court determined that even in the absence of the test claim statute, indigent defendants in capital cases were entitled to such funds under the Sixth Amendment of the federal Constitution. (*Id.* at p. 815.)

[88] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

Thus, even in the absence of Government Code section 3304, local government would still be required to provide a due process hearing under these situations.

The City of Sacramento, however, contends in comments to the draft staff analysis that prior law does not require due process protections outlined by the Supreme Court in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, for employees receiving short-term suspensions, reclassifications, or reprimands. The City states that five-day suspensions, written reprimands and other lesser forms of punishment are covered by POBOR, but not *Skelly* and, thus, the administrative appeal required by POBOR is reimbursable for the lesser forms of punishment.

The City raised the same argument when the Commission originally considered the test claim, and the Commission disagreed with the arguments.[89] The Commission finds that the Commission's original conclusion on this issue is correct.

As discussed below, the City is correct that the *pre-disciplinary* protections outlined in *Skelly* do not apply to a short-term suspension or written reprimand. But prior law still requires due process protection, including an administrative hearing, when a permanent employee receives a short-term suspension, reprimand, or other lesser form of punishment. Thus, the administrative hearing required by the test claim legislation under these circumstances does not constitute a new program or higher level of service or impose costs mandated by the state.

Skelly involved the discharge of a permanent civil service employee. The court held that such employees have a property interest in the permanent position and the employee may not be dismissed or subjected to other forms of punitive action without due process of law. Based on the facts of the case (that a discharged employee faced the bleak prospect of being without a job and the need to seek other employment hindered by the charges against him), the court held that the employee was entitled to receive notice of the discharge, the reasons for the action, a copy of the charges and materials upon which the action is based, and the right to a hearing to respond to the authority imposing the discipline *before* the discharge became effective.[90] The Supreme Court in *Skelly* recognized, however, that due process requirements are not so inflexible as to require an evidentiary trial at the *preliminary* stage in every situation involving the taking or property. Although some form of notice and hearing must preclude a final deprivation of property, the timing and content of the notice, as well as the nature of the hearing will depend on the competing interests involved.[91]

Three years after *Skelly*, the Supreme Court decided *Civil Service Association v. the City and County of San Francisco*, a case involving the short-term suspensions of eight civil service employees.[92] The court held that the punitive action involved with a short-term suspension is minor and does not require pre-disciplinary action procedures of the kind

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[89] See original Statement of Decision (AR, pp. 865-866).

[90] *Skelly, supra*, 15 Cal.3d 194, 213-215.

[91] *Id.* at page 209.

[92] *Civil Service Association v. City and County of San Francisco* (1978) 22 Cal.3d 552.

required by *Skelly*.[93] But the employees were still entitled to due process protection, including the right to a hearing, since the temporary right of enjoyment to the position amounted to a taking for due process purposes.[94] The court held as follows:

> However, while the principles underlying *Skelly* do not here compel the granting of predisciplinary procedures there mentioned, it does not follow that the employees are totally without right to hearing. *While due process does not guarantee to these appellants any Skelly-type predisciplinary hearing procedure, minimal concepts of fair play and justice embodied in the concept of due process require that there be a 'hearing,' of the type hereinafter explained.* The interest to be protected, i.e., the right to continuous employment, is accorded due process protection. While appellants may not in fact have been deprived of a salary earned but only of the opportunity to earn it, they had the expectancy of earning it free from arbitrary administrative action. [Citation omitted.] This expectancy is entitled to some modicum of due process protection. [Citation and footnote omitted.]
>
> For the reasons state above, however, we believe that such protection will be adequately provided in circumstances such as these by procedures of the character outlined in *Skelly*, (i.e., one that will apprise the employee of the proposed action, the reasons therefore, provide for a copy of the charges including materials upon which the action is based, and the right to respond either orally or in writing, to the authority imposing the discipline) *if provided either during the suspension or within reasonable time thereafter.*[95] (Emphasis added.)

Thus, the court held that the employees that did not receive a hearing at all were entitled to one under principles of due process.[96] As indicated in the Commission's original Statement of Decision, the Third District Court of Appeal in the *Stanton* case also found that due process principles apply when an employee receives a written reprimand without a corresponding loss of pay.[97]

Therefore, in the following situations, the Commission finds that the Commission's original decision in this case was correct in that Government Code section 3304 does not constitute a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c), since the administrative appeal merely implements the due process requirements of the state and federal Constitutions:

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[93] *Id.* at page 560.

[94] *Ibid.*

[95] *Id.* at page 564.

[96] *Id.* at page 565.

[97] *Stanton, supra,* 226 Cal.App.3d 1438, 1442.

- When a permanent employee is subject to a dismissal, demotion, suspension, reduction in salary, or a written reprimand.
- When the charges supporting the dismissal of a chief of police constitute moral turpitude, which harms the employee's reputation and ability to find future employment, thus imposing the requirement for a liberty interest hearing.

The due process clause, however, does not apply when a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee. In addition, the due process clause does not apply when local officials want to remove the chief of police under circumstances that do not create a liberty interest since the chief of police is an at-will employee and does not have a property interest in the position. Providing the opportunity for an administrative appeal under these circumstances is new and not required under prior law. In addition, none of the exceptions in Government Code section 17556 to the finding of costs mandated by the state apply to these situations.

Accordingly, the Commission finds that Government Code section 3304 constitutes a new program or higher level of service and imposes costs mandated by the state within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for providing the opportunity for an administrative appeal in the following circumstances only:

- When a permanent employee is transferred for purposes of punishment, denied a promotion on grounds other than merit, or suffers other actions that result in disadvantage, harm, loss or hardship that impacts the career opportunities of the permanent employee.
- When local officials want to remove the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment).

Interrogations

Government Code section 3303 prescribes protections that apply when "any" peace officer is interrogated in the course of an administrative investigation that might subject the officer to the punitive actions listed in the section (dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment). The procedures and rights given to peace officers under section 3303 do not apply to any interrogation in the normal course of duty, counseling, instruction, or informal verbal admonition by, or other routine or unplanned contact with, a supervisor. In addition, the requirements do not apply to an investigation concerned solely and directly with alleged criminal activities.[98]

The Commission found that the following activities constitute a new program or higher level of service and impose costs mandated by the state:

[98] Government Code section 3303, subdivision (i).

- When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
- Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
- Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

Government Code section 3313 directs the Commission to review these findings in order "to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions." The Commission finds that neither the *San Diego Unified School Dist.* case, nor any other court decision published since 1999, changes the Commission's conclusion that these activities constitute a new program or higher level of service and impose costs mandated by the state. Thus, these activities remain eligible for reimbursement when interrogating "any" peace officer, including probationary, at-will, and permanent officers that might subject the officer to punitive action.

The Commission also found that Government Code section 3303, subdivision (g), requires that:

- The peace officer employee shall have access to the tape recording of the interrogation if (1) any further proceedings are contemplated or, (2) prior to any further interrogation at a subsequent time.
- The peace officer shall be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential.

The Commission found that providing the employee with access to the tape prior to a further interrogation at a subsequent time constitutes a new program or higher level of service and imposes costs mandated by the state. However, the due process clause of the United States and California Constitutions already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the punitive, disciplinary action is based. Thus, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation, and produce the transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed confidential, to the peace officer employee when:

- a permanent employee is dismissed, demoted, suspended, receives a reduction in pay, or written reprimand; or
- a probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by charges of moral turpitude, which support the dismissal.

Under these circumstances, the Commission concluded that the requirement to provide these materials under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing these materials merely implements the requirements of the United States Constitution.

The Commission finds that the conclusion denying reimbursement to provide these materials following the interrogation when the activity is already required by the due process clause of the United States and California Constitutions is consistent with the Supreme Court's ruling in *San Diego Unified School Dist.* The costs incurred to comply with these interrogation activities are *not* triggered by a state-mandated event, but are triggered by discretionary decisions made by local officials to interrogate an officer. Under these circumstances, the court determined that even in the absence of the test claim statute, counties would still be responsible for providing services under the constitutional guarantees of due process under the federal Constitution.[99]

Thus, the Commission finds that the Commission's decision, that Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes costs mandated by the state for the following activities, is legally correct:

- Provide the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) the further proceeding is not a disciplinary punitive action;

  (b) the further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);

  (c) the further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

  (d) the further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

  (e) the further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

- Produce transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer following the interrogation, in the following circumstances:

  (a) when the investigation *does not* result in disciplinary punitive action; and

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[99] *San Diego Unified School Dist., supra*, 33 Cal.4th at page 888-889; *County of Los Angeles, supra,* 32 Cal.App.4th at page 815.

(b) when the investigation results in:

- a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- a transfer of a permanent, probationary or at-will employee for purposes of punishment;
- a denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.

The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.

The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted ..." to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:

> The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance

with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation.[100]

Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations.[101] It does not interfere with the employer's right to manage and control its own police department.[102]

Finally, the County of Orange contends that "[s]erious cases also tend to involve lengthy appeals processes that require delicate handling due to the increased rights under POBOR." For purposes of clarification, at the parameters and guidelines phase of this claim, the Commission denied reimbursement for the cost of defending lawsuits appealing the employer action under POBOR, determining that the test claim did not allege that the defense of lawsuits constitutes a reimbursable state-mandated program.[103] Government Code section 3313 does not give the Commission jurisdiction to change this finding.

Nevertheless, when adopting parameters and guidelines for this program, the Commission recognized the complexity of the procedures required to interrogate an officer, and approved several activities that the Commission found to be reasonable methods to comply with the mandated activities pursuant to the authority in section 1183.1, subdivision (a)(4), of the Commission's regulations. For example, the Commission authorized reimbursement, when preparing the notice regarding the nature of the interrogation, for reviewing the complaints and other documents in order to properly prepare the notice. The Commission also approved reimbursement for the mandated interrogation procedures when a peace officer witness was interrogated since the interrogation could lead to punitive action for that officer. Unlike other reconsideration statutes that directed the Commission to revise the parameters and guidelines, the Commission does not have jurisdiction here to change any discretionary findings or add any new activities to the parameters and guidelines that may be

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[100] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 (AR, p. 912).

[101] *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 26.

[102] *Baggett, supra*, 32 Cal.3d 128, 135.

[103] Analysis adopted by the Commission on the Parameters and Guidelines, July 22, 2000 Commission hearing (AR, pp. 904-906).

considered reasonable methods to comply with the program. The jurisdiction in this case is very narrow and limited to reviewing the Statement of Decision to clarify, as a matter of law, whether the test claim legislation constitutes a new program or higher level of service and imposes costs mandated by the state consistent with the California Supreme Court Decision in *San Diego Unified School Dist.* and other applicable court decisions.[104]

Adverse Comments

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, Government Code sections 3305 and 3306 impose the following requirements on employers:

- to provide notice of the adverse comment;[105]
- to provide an opportunity to review and sign the adverse comment;
- to provide an opportunity to respond to the adverse comment within 30 days; and
- to note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

As noted in the 1999 Statement of Decision, the Commission recognized that the adverse comment could be considered a written reprimand or could lead to other punitive actions taken by the employer. If the adverse comment results in a dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer or the comment harms an officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause of the state and federal constitutions.[106] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in

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[104] However, any party may file a request to amend the parameters and guidelines pursuant to the authority in Government Code section 17557.

[105] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment.*" Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[106] *Hopson, supra,* 139 Cal.App.3d 347.

providing notice and an opportunity to respond do not impose "costs mandated by the state". The Commission finds that this finding is consistent with *San Diego Unified School Dist.* since the local entity would be required, in the absence of the test claim legislation, to perform these activities to comply with federal due process procedures.[107]

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* specifically required by the case law interpreting the due process clause:

- obtaining the signature of the peace officer on the adverse comment, or
- noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Commission approved these two procedural activities since they were not expressly articulated in case law interpreting the due process clause and, thus, exceed federal law. The City of Sacramento contends that these activities remain reimbursable.

The Commission finds, however, that the decision in *San Diego Unified School Dist.* requires that these notice activities be denied pursuant to Government Code section 17556, subdivision (c), since they are "part and parcel" to the federal due process mandate, and result in "de minimis" costs to local government.

In *San Diego Unified School Dist.*, the Supreme Court held that in situations when a local discretionary decision triggers a federal constitutional mandate such as the procedural due process clause, "the challenged state rules or procedures that are intended to implement an applicable federal law -- and whose costs are, in context, de minimis -- should be treated as part and parcel of the underlying federal mandate."[108] Adopting the reasoning of *County of Los Angeles II*, the court reasoned as follows:

> In *County of Los Angeles II*, supra 32 Cal.App.4th 805 [unofficial cite omitted], the initial discretionary decision (in the former case, to file charges and prosecute a crime; in the present case, to seek expulsion) in turn triggers a federal constitutional mandate (in the former case, to provide ancillary defense services; in the present case, to provide an expulsion hearing). In both circumstances, the Legislature, in adopting specific statutory procedures to comply with the general federal mandate, reasonably articulated various incidental procedural protections. These protections are designed to make the underlying federal right enforceable and to set forth procedural details that were not expressly articulated in the case law establishing the respective rights; viewed singly or cumulatively, they do not significantly increase the cost of compliance with the federal mandate. The Court of Appeal in *County of Los Angeles II* concluded that, for purposes of ruling upon a claim for reimbursement, such incidental procedural requirements, producing at most de minimis added cost, should be viewed as part and parcel of the underlying federal

[107] *San Diego Unified School Dist., supra*, 33 Cal.4th 859, 888-889.

[108] *Id.* at page 890.

> mandate, and hence nonreimbursable under Government Code section 17556, subdivision (c). We reach the same conclusion here.[109]

The Commission finds that obtaining the officer's signature on the adverse comment or indicating the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause, are designed to prove that the officer was on notice about the adverse comment. Since providing notice is already guaranteed by the due process clause of the state and federal constitutions under these circumstances, the Commission finds that the obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment is part and parcel of the federal notice mandate and results in "de minimis" costs to local government.

Therefore, the Commission finds that, under current law, the Commission's conclusion that obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause is not a new program or higher level of service and does not impose costs mandated by the state. Thus, the Commission denies reimbursement for these activities.

Finally, the courts have been clear that an officer's rights under Government Code sections 3305 and 3306 are not limited to situations where the adverse comment results in a punitive action where the due process clause may apply. Rather, an officer's rights are triggered by the entry of "any" adverse comment in a personnel file, "or any other file used for personnel purposes," that may serve as a basis for affecting the status of the employee's employment.[110] In explaining the point, the Third District Court of Appeal stated: "[E]ven though an adverse comment does not directly result in punitive action, it has the potential for creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action."[111] Thus, the rights under sections 3305 and 3306 also apply to uninvestigated complaints. Under these circumstances (where the due process clause does not apply), the Commission determined that the Legislature, in statutes enacted before the test claim legislation, established procedures for different local public employees similar to the protections required by Government Code sections 3305 and 3306. Thus, the Commission found no new program or higher level of service to the extent the requirements existed in prior statutory law. The Commission approved the test claim for the activities required by the test claim legislation that were not previously required under statutory law.[112] Neither *San Diego Unified School Dist.*, nor any other

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[109] *Id.* at page 889.

[110] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925.

[111] *Id.* at page 926.

[112] For example, for counties, the Commission approved the following activities that were not required under prior statutory law:

> If an adverse comment is related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

case, conflicts with the Commission's findings in this regard. Therefore, the Commission finds that the denial of activities following the receipt of an adverse comment that were required under prior statutory law, and the approval of activities following the receipt of an adverse comment that were *not* required under prior statutory law, was legally correct.

CONCLUSION

The Commission finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further finds that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

If an adverse comment is not related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[113] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

[113] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

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November 15, 2006

TO: ALL INTERESTED PERSONS

FROM: Paula Higashi, Executive Director

RE: Notice, New Filings, and Agenda

The Commission will hold its regular bimonthly meeting and hearing on Monday, December 4, 2006. The meeting will be convened at 1:30 p.m., Department of Water Resources, 1416 Ninth Street, First Floor, Auditorium, in Sacramento, California.

Testimony at the Commission Hearings. If you plan to address the Commission on an agenda item please notify the Commission Office by noon, two days before the hearing. When calling, identify the item and the entity you represent. The Chairperson reserves the right to impose time limits on presentations as may be necessary to complete the agenda.

Agenda Materials. All back-up material and supporting documentation for public meetings are available for public inspection at the Commission Office, 980 Ninth Street, Suite 300, Sacramento, California 95814; (916) 323-3562. In addition, a complete copy of the above-described materials will be available for public inspection at the meetings.

Web Site. Agenda items are available on the Commission's Web Site (http://www.csm.ca.gov/). After reaching the site's home page, click on the words "Current Hearing" on the left side of the page for the hearing agenda. Generally, the short agenda will be uploaded two weeks prior to the hearing. Items will be uploaded approximately one week before the hearing without exhibits and may be accessed from the agenda. If an item is postponed prior to the hearing, notice will be posted on the agenda. Following the hearing, Commission actions will be posted on the agenda, and revised items will be posted upon completion. Each month's agenda will remain posted until the following month is uploaded.

The approved minutes of previous commission meetings are also on the Web Site in PDF formats. To access the minutes, click on the words "Hearings/Minutes" on the left side of any page. The most recent minutes become available following approval by the Commission, generally after the next hearing.

Special Accommodations. If you need any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Enclosures

TO RECEIVE NOTICES AND AGENDAS FOR COMMISSION MEETINGS AND HEARINGS ELECTRONICALLY, SUBSCRIBE BY VISITING THE COMMISSION'S WEBSITE AT HTTP://WWW.CSM.CA.GOV AND CLICKING ON THE "AGENDA SUBSCRIPTION" LINK IN THE BOTTOM RIGHT CORNER.

COMMISSION ON STATE MANDATES
NOTICE AND AGENDA[1]

Note Different Location:

Department of Water Resources
1416 Ninth Street, First Floor, Auditorium
Sacramento, California

December 4, 2006
1:30 P.M.

I. CALL TO ORDER AND ROLL CALL

II. APPROVAL OF MINUTES (action)

Item 1 October 4, 2006

Item 2 October 26, 2006

III. PROPOSED CONSENT CALENDAR (action)

Item 3 If there are no objections to any of the following action items designated by an asterisk (*), the Executive Director will include it on the Proposed Consent Calendar that will be presented at the hearing. The Commission will determine which items will remain on the Consent Calendar.

IV. APPEAL OF EXECUTIVE DIRECTOR DECISIONS PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, SECTION 1181, SUBDIVISION (c). (action)

(Note: This item is limited to appeals regarding this month's agenda items.)

Item 4 Staff Report (if necessary)

V HEARINGS AND DECISIONS ON CLAIMS, PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 7 (Gov. Code, §§ 17551 and 17559) (action)

(Note: Items 6, 8, and 10 will not be voted on unless the staff recommendations for Items 5, 7, and 9 are adopted.)

A. TEST CLAIMS

Item 5 *Pupil Safety Notices*, 02-TC-13
Education Code Sections 32242, 32243, 32245, 46010.1; 48904, 48904.3, 48987 and Welfare and Institutions Code Section 18285
Statutes 1983, Chapter 498 (SB 813); Statutes 1984, Chapter 482 (AB 3757); Statutes 1984, Chapter 948 (AB 2549); Statutes 1986, Chapter 196 (AB 1541); Statutes 1986, Chapter 332 (AB 2824); Statutes 1992, Chapter 445 (AB 3257); Statutes 1992, Chapter 1317 (AB 1659); Statutes 1993, Chapter 589 (AB 2211); Statutes 1994, Chapter 1172 (AB 2971); Statutes 1996, Chapter 1023 (SB 1497);

[1] This public meeting notice is available on the Internet at http://www.csm.ca.gov.

Statutes 2002, Chapter 492 (AB 1859)
Title 5, California Code of Regulations, Section 11523
San Jose Unified School District, Claimant

Item 6 Proposed Statement of Decision
Pupil Safety Notices, 02-TC-13
See Above

Item 7 *California Fire Incident Reporting System (CFIRS) Manual*
4419, 00-TC-02
Health and Safety Code Section 13110.5
Statutes 1987, Chapter 345 (SB 2187)
CFIRS Manual – Version 1.0 (July 1990)
San Ramon Valley Fire Protection District and City of Newport Beach, Claimants

Item 8 Proposed Statement of Decision
California Fire Incident Reporting System (CFIRS) Manual
4419, 00-TC-02
See Above

Item 9 Local Government Employment Relations, 01-TC-30
Government Code Sections 3500, 3500.5, 3501, 3502.5, 3507.1, 3508.5, 3509, 3510, and 3511
Statutes 2000, Chapter 901 (SB 739)
Title 8, California Code of Regulations, Sections 31001-61630
City of Sacramento, County of Sacramento, Claimants

Item 10 Proposed Statement of Decision
Local Government Employment Relations, 01-TC-30
See Above

VI. INFORMATIONAL HEARING PURSUANT TO CALIFORNIA CODE OF REGULATIONS, TITLE 2, CHAPTER 2.5, ARTICLE 8 (action)

A. ADOPTION OF PROPOSED PARAMETERS AND GUIDELINES AND PROPOSED PARAMETERS AND GUIDELINES AMENDMENTS

Item 11* Proposed Parameters and Guidelines
Local Recreational Areas: Background Screenings, 01-TC-11
Public Resources Code Section 5164, Subdivisions (b)(1) and (b)(2)
Statutes 2001, Chapter 777 (AB 351)
City of Los Angeles, Claimant

Item 12* Proposed Parameters and Guidelines
Charter Schools III, 99-TC-14
Western Placer Unified School District and Fenton Avenue Charter School, Claimants
Education Code Sections 47605, subdivision (b), and 47635

Statutes 1998, Chapter 34 (AB 544); Statutes 1999, Chapter 78 (AJR 19)
California Department of Education Memo (May 22, 2000)
And
Request to Consolidate With *Charter Schools* (CSM 4437)
and *Charter Schools II* (99-TC-03)

Item 13 Requests to Amend Parameters and Guidelines:
Peace Officer Procedural Bill of Rights
04-PGA-05, 05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21; and
05-PGA-22 (4499; 05-RL-4499-01)
Government Code Sections 3301, 3303, 3304, 3305, and 3306
As Added and Amended by Statutes 1976, Chapter 465 (AB 301);
Statutes 1978, Chapters 775 (AB 2916), 1173 (AB 2443), 1174
(AB 2696), and 1178 (SB 1726); Statutes 1979, Chapter 405 (AB 1807);
Statutes 1980, Chapter 1367 (AB 2977); Statutes 1982, Chapter 994
(AB 2397); Statutes 1983, Chapter 964 (AB 1216); Statutes 1989,
Chapter 1165 (SB 353); and Statutes 1990, Chapter 675 (AB 389)
Directed by Government Code Section 3313, as added by
Statutes 2005, Chapter 72 (AB 138, § 6, eff. July 19 2005)

California State Association of Counties , County of Los Angeles,
County of San Bernardino, Department of Finance, and State Controller's
Office, Requestors

Item 14 Requests to Amend Parameters and Guidelines
Handicapped and Disabled Students, 00-PGA-03/04 (CSM 4282)
Government Code Sections 7570-7588
Statutes 1984, Chapter 1747 (AB 3632);
Statutes 1985, Chapter 1274 (AB 882)

California Code of Regulations, Title 2, Sections 60000-60610
(Emergency Regulations filed December 31, 1985, designated effective
January 1, 1986 (Register 86, No. 1) and re-filed June 30, 1986,
designated effective July 12, 1986 (Register 86, No. 28))
Counties of Los Angeles and Stanislaus, Requestors

Item 15* Request to Amend Parameters and Guidelines
To Add Time Study Language to *All Parameters & Guidelines,*
04-PGA-04 State Controller's Office, Requestor

VII. STAFF REPORTS

Item 16 Chief Legal Counsel's Report (info)
Recent Decisions, Litigation Calendar

Item 17 Executive Director's Report (info/action)
Workload, Budget, Legislation, and Next Hearing

VIII. PUBLIC COMMENT

Mandate Reform

IX. . CLOSED EXECUTIVE SESSION PURSUANT TO GOVERNMENT CODE SECTIONS 11126 and 17526.

A. PERSONNEL

Report from Personnel Subcommittee and to confer on personnel matters pursuant to Government Code sections 11126, subdivision (a) and 17526.

B. PENDING LITIGATION

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matters pursuant to Government Code section 11126, subdivision (e)(1):

1. *State of California, Department of Finance v. Commission on State Mandates, et al.,* Sacramento Superior Court Case No. 03CS01069, CSM Case No. 03-L-01, consolidated with *County of Los Angeles v. Commission on State Mandates, et al.*, Los Angeles Superior Court Case No. BS087959, transferred to Sacramento Superior Court, Case No. 05CS00865, CSM Case No. 03-L-11 [*Animal Adoption*]

2. *State of California, Department of Finance v. Commission on State Mandates, et al.*, Sacramento Superior Court Case No. 03CS01432, CSM Case No. 03-L-02 [*Behavioral Intervention Plans*]

3. *CSAC Excess Insurance Authority v. Commission on State Mandates, et al.,* Second District Court of Appeal, Case Number B188169, on appeal from Los Angeles Superior Court Case No. BS092146, CSM Case No. 04-L-01 [*Cancer Presumption for Law Enforcement and Firefighters* and *Lower Back Injury Presumption for Law Enforcement*], consolidated with *City of Newport Beach v. Commission on State Mandates, et al.,* Los Angeles Superior Court Case No. BS095456, CSM Case No. 04-L-02 [*Skin Cancer Presumption for Lifeguards*]

4. *County of Los Angeles, et al. v. Commission on State Mandates, et al.*, Second District Court of Appeal [Los Angeles] Case Number B183981, CSM Case No. 04-L-03, (Los Angeles Superior Court Nos. BS089769, BS089785) [*Transit Trash Receptacles, et al./Waste Discharge Requirements*]

5. *County of San Bernardino v. Commission on State Mandates, et al.*, San Bernardino County Superior Court, Case No. SCVSS 138622 [*Standardized Emergency Management Systems (SEMs)]*

6. *California School Boards Association, Education Legal Alliance; County of Fresno; City of Newport Beach; Sweetwater Union High School Districtand County of Los Angeles v. Stat of California, Commission on State Mandates and Steve Westly, in his capacity as State Controller,* Sacramento County Superior Court, Case No. 06CS01335; [AB 138; *Open Meetings Act, Brown Act Reform, Mandate Reimbursement Process I and II; and School Accountability Report Cards (SARC) I and II*]

To confer with and receive advice from legal counsel, for consideration and action, as necessary and appropriate, upon the following matter pursuant to Government Code section 11126, subdivision (e)(2):

Based on existing facts and circumstances, there is a specific matter which presents a significant exposure to litigation against the Commission on State Mandates, its members and/or staff (Gov. Code, § 11126, subd. (e)(2)(B)(i).)

IX. REPORT FROM CLOSED EXECUTIVE SESSION, RECONVENE IN PUBLIC SESSION

X. ADJOURNMENT

For information, contact:

Paula Higashi, Executive Director
980 Ninth Street, Suite 300
Sacramento, CA 95814

(916) 323-8210
(916) 445-0278 Fax
Email: paula.higashi@csm.ca.gov

I plan to be there!
Bonnie

From: Allan P Burdick/MAXIMUS [mailto:allanburdick@maximus.com]
Sent: Thursday, November 16, 2006 10:15 AM
To: everroad@city.newport-beach.ca.us; mark.burton@sanjoseca.gov; jmcpherson@fontana.org; ramaiah.venkatesan@fin.co.santa-clara.ca.us; eroeser@sonoma-county.org; msampiet@sonoma-county.org; monican@ci.garden-grove.ca.us; hnaha@ac.cccounty.org; Ter Keurst, Bonnie - ACR; lkaye@auditor.co.la.ca.us; hyaghobyan@auditor.co.la.ca.us; ngust@sacsheriff.com; lhobson@placer.ca.gov; cstrobel@co.napa.ca.us; dave.elledge@fin.sccgov.org; mcady@ocsdfinancial.org; gina.surgeon@sdcounty.ca.gov; gingerbernard@maximus.com; pstone1100@aol.com; n2199@lapd.lacity.org; vs448@lapd.lacity.org; julianagmur@msn.com; ferlynjunio@maximus.com; steveoppenheim@maximus.com; allanburdick@maximus.com; timothy.barry@sdcounty.ca.gov; lesliemoore@co.fresno.ca.us; sherie.peterson@acgov.org; inderdeep.dhillon@sanjoseca.gov; pkindig@co.napa.ca.us; marilyn.flores@sdcounty.ca.gov; lwalker@acgov.org; ken.gross@acgov.org; crystal.hishida@acgov.org; dmichel@cacities.org; dcarrigg@cacities.org; skeil@counties.org; leslie.burns@acgov.org; claude.kolm@acgov.org; jolenetollenaar@maximus.com; elee@cao.lacity.org; carmpd@co.riverside.ca.gov; ksergeant@co.el-dorado.ca.gov; tarrance.truong@acgov.org; jhenning@counties.org; jhurst@counties.org; qtho@solanocounty.com; amcgarvey@co.slo.ca.us; pstone1100@aol.com; rperry@aaronread.com; skeil@counties.org; allanburdick@maximus.com; gingerbernard@maximus.com; stenbakkend@cacities.org; dcontreras@cityofsacramento.org; n2157@lapd.lacity.org; liebertj@aol.com; lkaye@auditor.co.la.ca.us; scott_robertson@longbeach.gov; christina_checel@longbeach.gov; g9859@lapd.lacity.org; kathy.blessing@lacity.org; dwall@counties.org; everroad@ci.newport-beach.ca.us; n2199@lapd.lacity.org; v8448@lapd.lacity.org; n25238@lapd.lacity.org; silvia.y.solis@lacity.org; tim@timyaryan.com; etakach@cityofsacramento.org; pat.canfield@lacity.org; jlewis@counties.org; mtesterman@csda.org; ccoyne@calsheriffs.org; nwarner@att.net; jhurst@counties.org; sheaton@rcrcnet.org; micheld@cacities.org; urbans@ix.net.com; carriggd@cacities.net; sszaly@calsheriffs.org; jhenning@counties.org; jlovell@johnlovell.com; kspank@att.net; marla.marshall@sdsheriff.org; nwarner@worldnet.att.net; Ferguson, Barbara; dave.elledge@fin.sscgov.org; lwalker@acgov.org; myrtmp55@lacity.org; ccole@advocation-inc.com; rlopez@counties.org; geverroad@city.newport-beach.ca.us; nadia.leal@sen.ca.gov; bsiverling@comcast.net; ccole@advocation-inc.com; marnold@mjarnold.com; sjlegsac@pacbell.net; abrown@dvbsr.com; djones@pacbell.net; alan@edelsteingilbert.com; rkindel@rosekindel.com; paul@shawyoder.org; imsa@imsa.com; urbans@ix.netcom.com; dlabahn@cdaa.org; paul@shawyoder.org; nwarner@att.net; imsa@imsa.com; cchristian@nmgovlaw.com; michaelycorbett@yahoo.com; dwall@counties.org; hcs@platinumadvisors.com; mcfadden@saccounty.net; bclay@carpiclay.com; mrattigan@sbcglobal.net
Subject: Lunch Before Dec 4th POBOR Hearing

Everyone,

For some of you, this is a new issue. I send a follow-up e-mail to the county lobbyist that have been added to the e-mail group. While you may not view the hearing as a top priority, the next step is likely to be legislation similar to SB 328 (Cedillo) of last year.

Since the Commission on State Mandates hearing to consider POBOR funding options at 1:30 p.m. on Monday, December 4th, at the Water Resources Building, we thought it would be a good idea to schedule a get together for the people that plan to attend the hearing. We have reserved space at Franks Fat's (8th

and L Streets) for a noon lunch. Since we expect a number of people, Fat's has requested we have one of their preselected family or banquet style menu's. We were unable to get the upstairs room due to Holiday Season luncheons, but they said they can accommodate us in the main restaurant. The lunch will probably be something close to $20 a piece.

Please let me know if you would like to join the group. We can get organized and also have some good food.

Allan

Allan P. Burdick
Director
CSAC & CA Cities SB 90 Services
(916) 485-8102 x 113
(916) 203-3608 (cell)

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

PROPOSED AMENDMENTS TO THE PARAMETERS AND GUIDELINES:

Government Code Sections 3301, 3303, 3304, 3305, and 3306, as added and amended by Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675; and,

Filed on May 25, 2006 by California State Association of Counties, and,

Filed on June 15, 2006 by County of Los Angeles, to replace and supersede May 22, 2006 filing, and,

Filed on June 15, 2006 by County of San Bernardino; and,

Filed on June 29, 2006 by the Department of Finance, and,

Filed on June 29, 2006 by State Controller's Office to replace and supersede May 5, 2005 filing.

Case Nos.:05-PGA-18, 05-PGA-19, 05-PGA-20 05-PGA-21; and 05-PGA-22

(CSM-4499 and 05-RL-4499-01)

Peace Officers Procedural Bill of Rights (POBOR)

RELEASE OF FINAL STAFF ANALYSIS AND PROPOSED AMENDMENTS TO THE PARAMETERS AND GUIDELINES AND NOTICE OF HEARING

Date: December 4, 2006
Time: 1:30 pm.
Place:: Department of Water Resources
First Floor Auditorium
1416 Ninth Street
Sacramento, California

Website: http://www.csm.ca.gov/pobor

TO: League of California Cities
California State Association of Counties
Department of Personnel Administration
Department of Finance
State Controller's Office
State Personnel Board
Legislative Analyst
Interested Parties and Persons
Legislative Committees

Commission Hearing – December 4, 2006, Item 13

The attached final staff analysis and proposed modifications to the parameters and guidelines are being posted to the Commission's website under the "POBOR" button and "Hearings".

The Commission will hear and act upon the proposed requests to amend the parameters and guidelines on December 4, 2006, at 1:30 p.m., Department of Water Resources, 1416 Ninth Street, First Floor Auditorium, Sacramento, California.

Please let us know by Friday, December 1, 2006, if you or a representative of your agency will testify at the hearing, and if other witnesses will also appear.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven working days prior to the meeting.

If you have any questions regarding this matter, please contact Nancy Patton, Assistant Executive Director at (916) 323-8217.

Dated: November 21, 2006

PAULA HIGASHI, Executive Director

Attachments: Final Staff Analysis and
Proposed Amendments to Parameters and Guidelines As Modified by Staff

Hearing: December 4, 2006
J:mandates/recon/2005/AB138/POBOR/120406hearing/fsa

ITEM 13

FINAL STAFF ANALYSIS

REQUESTS TO AMEND PARAMETERS AND GUIDELINES

Government Code Sections 3301, 3303, 3304, 3305, 3306

As Added and Amended by Statutes 1976, Chapter 465; Statutes 1978, Chapters 775, 1173, 1174, and 1178; Statutes 1979, Chapter 405; Statutes 1980, Chapter 1367; Statutes 1982, Chapter 994; Statutes 1983, Chapter 964; Statutes 1989, Chapter 1165; and Statutes 1990, Chapter 675

Directed by Government Code Section 3313, as added by Statutes 2005, Chapter 72 (Assem. Bill No. 138, § 6, eff. July 19 2005)

Peace Officers Procedural Bill of Rights (POBOR)[1]

California State Association of Counties, City of Sacramento, County of Los Angeles
County of San Bernardino, Department of Finance, and State Controller's Office, Requestors

05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22
(CSM-4499 and 05-RL-4499-01)

EXECUTIVE SUMMARY

Background

The Legislature enacted the Peace Officers Procedural Bill of Rights Act (commonly abbreviated as "POBOR"), by adding Government Code sections 3300 through 3310, in 1976. POBOR provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Generally, POBOR prescribes certain procedural protections that must be afforded officers during interrogations that could lead to punitive action against them; gives officers the right to review and respond in writing to adverse comments entered in their personnel files; and gives officers the right to an administrative appeal when any punitive action, as defined by statute, is taken against them, or they are denied promotion on grounds other than merit.

On November 30, 1999, the Commission approved the POBOR test claim and adopted the original Statement of Decision (CSM 4499). The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the

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[1] Staff substituted the acronym "POBOR" throughout this document for all variations used in requests, comments, and other filings from interested parties and affected state agencies.

state pursuant to Government Code section 17556, subdivision (c). The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

In 2005, Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on POBOR to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration (05-RL-4499-01). The Statement of Decision on reconsideration became final on May 1, 2006. On review of the claim, the Commission found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission *except* the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Statement of Decision adopted by the Commission on this reconsideration applies to costs incurred and claimed for the 2006-2007 fiscal year.

Requests to Amend Parameters and Guidelines

In May 2005, before the Commission reconsidered its original POBOR decision, the State Controller's Office filed a request to amend the parameters and guidelines. The request remained pending when the Commission adopted its Statement of Decision on reconsideration in May 2006.

At the time the Commission adopted the Statement of Decision on reconsideration, the Commission directed staff to work with state agencies and interested parties to develop and recommend a reasonable reimbursement methodology pursuant to Government Code section 17519.5 for inclusion in the revised parameters and guidelines. Subsequently, proposed amendments were filed by the State Controller's Office to supersede the proposed amendments previously filed in May, 2005; the Counties of San Bernardino and Los Angeles; the California State Association of Counties (CSAC); and the Department of Finance. The parties have proposed changes to the reimbursable activities and have proposed different reasonable reimbursement methodologies, as described in the analysis.

Proposed Changes to Reimbursable Activities

Staff has reviewed the proposed amendments and recommends that the following changes be made to the parameters and guidelines for costs incurred beginning July 1, 2006:

- The addition of time study language to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.
- Deletion of specific activities relating to the administrative appeal hearing and the receipt of an adverse comment that the Commission expressly denied in the Statement of Decision on reconsideration.
- Clarification of administrative activities, and activities related to the administrative appeal, interrogations, and adverse comments that are consistent with the Commission's Statement of Decision adopted in 1999, the Statement of Decision on reconsideration,

and the Commission's prior findings when adopting the original parameters and guidelines. Language is included to clarify that certain activities are *not* reimbursable, including investigation and conducting the interrogation. The Commission expressly denied reimbursement for these activities when it adopted the original parameters and guidelines in 2000 and, again, when it adopted the Statement of Decision on reconsideration in April 2006.

Reasonable Reimbursement Methodology

Upon adoption of the POBOR Statement of Decision on reconsideration, the Commission directed staff to form a working group to develop a reasonable reimbursement methodology to reimburse local governments for state-mandated costs. The California State Association of Counties (CSAC), the County of Los Angeles, and the DOF filed proposals. The following three proposals were reviewed by claimants, affected state agencies and Commission staff and discussed in three pre-hearing conferences.

- The **California State Association of Counties** requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology that would reimburse local agencies $528 per peace officer employed by the agency on January 1 of the claim year, with annual adjustments based on the Implicit Price Deflator.
- The **County of Los Angeles** requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology that would allow local agencies to be reimbursed based on *approximations of local costs mandated by the state*. This proposal is based on studies of claims data submitted to the Controller's Office for the 2001-2002 through 2004-05 fiscal years. The County describes its proposal as a reimbursement formula which reflects differences in POBOR case loads among local law enforcement agencies and differences in the numbers of peace officers employed by those agencies. The reasonable reimbursement methodology is comprised of three components: (1) *Unit Case Costs* are determined by multiplying the number of unit level cases X 12 standard hours X productive hourly rate; (2) *Extended Case Costs* are determined by multiplying number of extended cases X 162 standard hours X productive hourly rate; 3) Uniform Costs are determined by multiplying the number of peace officers X standard rate of $100. The costs from these three components are then totaled for the annual claim amount.
- The **Department of Finance (DOF)** requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology. Under this methodology, a distinct "base rate" would be calculated for each claimant based on SCO audited amounts for four years of claims. The annual reimbursement would be the result of multiplying the "base rate" by the number of covered officers. The base rates would be adjusted annually by an appropriate factor to capture the normal cost increases. A process for determining *mean* reimbursement rates while final reimbursement rates are determined.

Based on the plain meaning of Government Code section 17518.5, the statute defining *reasonable reimbursement methodology*, staff finds that:

- The Department of Finance, the State Controller, affected state agencies, a claimant, or an interested party is authorized to develop a reasonable reimbursement methodology.

- There is no statutory requirement or authority for the Commission to audit reimbursement claims and to develop a reasonable reimbursement methodology proposal that complies with section 17518.5.
- The conditions or criteria for defining a reasonable reimbursement methodology are defined in section 17518.5 and may not be changed by the Commission.

For the reasons stated in the analysis, staff concludes that the proposed reasonable reimbursement methodologies submitted by the California State Association of Counties, the County of Los Angeles, and the Department of Finance do not meet the following conditions in section 17518.5, and, therefore, must be denied:

(1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.

(2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

Staff Recommendation

Staff recommends the Commission:

- adopt the proposed amendments to the parameters and guidelines for the Peace Officer Bill of Rights program, as modified by staff, beginning on page 49; and,
- authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

STAFF ANALYSIS

Requestors

California State Association of Counties
County of Los Angeles
County of San Bernardino
Department of Finance
State Controller's Office

Chronology

11/30/1999	Commission on State Mandates (Commission) adopts original Statement of Decision
07/27/2000	Commission adopts parameters and guidelines
03/29/2001	Commission adopts statewide cost estimate
10/15/2003	Bureau of State Audits issues report on Peace Officers' Procedural Bill of Rights (commonly referred to as POBOR) and Animal Adoption Programs, Report No. 2003-106
05/05/2005	State Controller's Office files proposed amendments to the parameters and guidelines
07/19/2005	AB 138 (Statutes 2005, chapter 72) becomes effective, directing the Commission to reconsider the original POBOR Statement of Decision by July 1, 2006
04/26/2006	Commission reconsiders POBOR test claim, adopts Statement of Decision, and directs staff to work with state agencies and interested parties to develop and recommend a reasonable reimbursement methodology pursuant to Government Code section 17518.5 for inclusion in the revised parameters and guidelines[2]
05/23/2006	County of Los Angeles files proposed amendments to the parameters and guidelines
05/25/2006	Commission staff holds first prehearing conference
05/25/2006	California State Association of Counties files proposed amendments to the parameters and guidelines[3]
06/15/2006	County of Los Angeles files proposed amendments to the parameters and guidelines to replace and supersede proposed amendments filed on May 23, 2006[4]

[2] See Exhibit A.

[3] See Exhibit B.

[4] See Exhibit C.

06/15/2006	County of San Bernardino files proposed amendments to parameters and guidelines[5]
06/29/2006	State Controller's Office files proposed amendment to parameters and guidelines to supersede amendment previously filed on May 5, 2005.[6]
06/29/2006	Department of Finance files proposed amendments to parameters and guidelines[7]
7/27/2006	Commission staff holds second prehearing conference.
08/04/2006	County of Los Angeles files comments.
	City of Sacramento files comments.
	Department of Finance files comments.
	State Controller's Office files comments.[8]
08/17/2006	County of Los Angeles files rebuttal comments.
	Department of Finance files rebuttal comments.[9]
08/31/2006	Commission issues draft staff analysis and proposed amendments to parameters and guidelines, as modified by staff.[10]
09/08/06	County of Los Angeles requests a pre-hearing conference, an extension of time to file comments, and a postponement of the hearing[11]
09/11/06	County of Los Angeles' requests are granted.[12]
09/22/06	City of Los Angeles and City of Sacramento file comments on the draft staff analysis.
09/28/06	County of Los Angeles files comments on the draft staff analysis.
10/25/06	Pre-hearing conference held.
10/30/06	County of San Bernardino and Department of Finance file comments on the draft staff analysis.[13]

[5] See Exhibit D.

[6] See Exhibit E.

[7] See Exhibit F.

[8] See Exhibit G for all comments.

[9] See Exhibit G.

[10] See Exhibit H.

[11] Exhibit I.

[12] Exhibit I.

[13] See Exhibit J for all comments to the draft staff analysis.

Summary of the Mandate

On November 30, 1999, the Commission approved the test claim and adopted the original Statement of Decision on the POBOR program. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

A technical correction was made to the parameters and guidelines on August 17, 2000.

In 2005, Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on POBOR to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration (05-RL-4499-01). The Statement of Decision on reconsideration

became final on May 1, 2006. On review of the claim, the Commission found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the POBOR legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[14] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Statement of Decision adopted by the Commission on this reconsideration applies to costs incurred and claimed for the 2006-2007 fiscal year.

Proposed Amendments to the Parameters and Guidelines

The Commission received five proposed amendments to the parameters and guidelines, filed by the California State Association of Counties, the County of Los Angeles, the County of San Bernardino, the Department of Finance, and the State Controller's Office, as follows:

The ***California State Association of Counties*** (05-PGA-19) requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology that would reimburse local agencies $528 per peace officer employed by the agency on January 1 of the claim year, with annual adjustments based on the Implicit Price Deflator.

The ***County of Los Angeles*** (05-PGA-18) requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology that would allow local agencies to

[14] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

be reimbursed based on *approximations of local costs mandated by the state*. This proposal is based on studies of claims data submitted to the Controller's Office for the 2001-2002 through 2004-2005 fiscal years. The County of Los Angeles describes its proposal as a reimbursement formula which reflects differences in POBOR case loads among local law enforcement agencies and differences in the numbers of peace officers employed by those agencies. The reasonable reimbursement methodology is comprised of three components: (1) *Unit Case Costs* are determined by multiplying (the number of unit level cases) X (12 standard hours) X (productive hourly rate); (2) *Extended Case Costs* are determined by multiplying (the number of extended cases) X (162 standard hours) X (productive hourly rate); and (3) Uniform Costs are determined by multiplying (the number of peace officers) X (standard rate of $100). The costs from these three components are then totaled for the annual claim amount.

In response to the draft staff analysis, the County of Los Angeles contends that the Commission should approve its time survey forms and instructions with respect to the activities performed by the agency's Unit Level, Internal Affairs, and Administrative Appeals unit, and make them applicable to the time studies used by all claimants.

The ***County of San Bernardino*** (05-PGA-20) requests that the parameters and guidelines be amended to allow claimants to file reimbursement claims based on actual costs or the CSAC-SB 90 Group reasonable reimbursement methodology proposal of $528 per peace officer. The County of San Bernardino also proposes amendments to: (1) update the parameters and guidelines based on the reconsideration; (2) clarify the descriptions of "Interrogations" and "Adverse Comment" under Section IV. Reimbursable Activities; and (3) update and clarify Sections V. through X. to conform with recently adopted language.

The ***Department of Finance*** **(DOF)** (05-PGA-22) requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology. Under this methodology, a distinct "base rate" would be calculated for each claimant based on the State Controller's audited amounts for four years of claims. The annual reimbursement would be the result of multiplying the "base rate" by the number of covered officers. The base rates would be adjusted annually by an appropriate factor to capture the normal cost increases. A process for determining *mean* reimbursement rates while final reimbursement rates are determined.

The ***State Controller's Office*** **(SCO)** (05-PGA-21) requests that the parameters and guidelines amendment previously filed on May 5, 2005, be superseded by their June 29, 2006 filing. The SCO proposes changes to clarify reimbursable activities consistent with the Statement of Decision adopted November 30, 1999, and to add the "time study" language and the Commission's previously adopted standardized language. The proposed amendments do not include changes reflected in the Commission's Statement of Decision adopted April 26, 2006.

Discussion

Staff reviewed the proposed amendments to the parameters and guidelines and the comments received. Non-substantive technical changes were made for purposes of clarification, consistency with language in recently adopted parameters and guidelines, and conformity to the Statement of Decision on reconsideration and statutory language. Substantive changes were considered, and if appropriate, were made as described below.

Section IV. REIMBURSABLE ACTIVITIES

Government Code section 17557, subdivision (d), allows local agencies, school districts, and the state to file a written request with the Commission to amend the parameters and guidelines. Any amendment to the parameters and guidelines must be consistent with, and not contradict, the Statement of Decision. The Statement of Decision is the legal determination on the question of whether a state mandate exists and, if so, what the mandate is.[15] The findings and conclusion in the Statement of Decision are binding on the parties once it is mailed or served unless a writ of mandate pursuant to Government Code section 17559 and Code of Civil Procedure section 1094.5 is issued by a court to set aside the Commission's decision.[16] In addition, the Commission does not have jurisdiction to retry an issue that has become final. It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void.[17]

Thus, for purposes of this item, the proposed amendments must be consistent with the Commission's Statement of Decision adopted in 1999 and the Statement of Decision on reconsideration adopted on April 26, 2006. The Statement of Decision on reconsideration amends the 1999 decision and applies to costs incurred and claimed for the 2006-2007 fiscal year.

Furthermore, the Commission, when adopting parameters and guidelines, or a proposed amendment to the parameters and guidelines, has the discretion to determine the most reasonable methods of complying with the mandate. The most reasonable methods of complying with the mandate are those methods not specified in statute or executive order that are necessary to carry out the mandated activity. (Cal. Code Regs., tit. 2, § 1183.1, subd. (a)(4).) Any proposed method of complying with a mandated activity must be consistent with an activity approved by the Commission in the Statement of Decision as a reimbursable state-mandated activity.

Thus, for an activity to be reimbursable, it must either be required by the statutes or executive order found by the Commission in the Statement of Decision to impose a reimbursable state mandated activity; or be a reasonable method of complying with the statutes or executive order

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[15] Government Code sections 17500 and 17552; *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 332-333; and *City of Richmond v. Commission on State Mandates* (1998) 64 Cal.App.4th 1190, 1201.)

[16] California Code of Regulations, title 2, section 1188.2, subdivision (b).

[17] See, *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697, where the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by the court; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final.

found by the Commission in the Statement of Decision to impose a reimbursable state-mandated activity.[18]

Time Studies

The SCO requests that the parameters and guidelines be amended to include language authorizing the use of time studies to support salary and benefit costs for task-repetitive activities. The SCO's proposed language states the following:

> Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the time study guidelines included in the State Controller's annual claiming instructions. If the claimant performs a time study, the claimant should separately study Unit Level cases and Internal Affairs cases, as their caseloads are significantly different in size, type, complexity, duration, and volume.[19]

The DOF generally agrees with the use of time studies.[20] The City of Los Angeles agrees with the use of time studies, but argues that the Commission should include specific language for an entity's use of time studies.[21]

When BSA audited this program, BSA recognized that there may be instances when it is impractical to maintain source documents with the level of detail needed to identify actual costs. In such cases, BSA acknowledged that a properly prepared and documented time study may be a reasonable substitute for actual time sheets. BSA concluded, however, that none of the claims of the four local entities reviewed by BSA used an adequate time study.[22] Claimants based the amount of time they claimed on interviews and informal estimates developed after the related activities were performed.[23]

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[18] The County of San Bernardino, in comments to the draft staff analysis, argues that the analysis of this item goes beyond the scope of the Legislature's directive in AB 138 to reconsider the POBOR decision. The Commission's jurisdiction for this item is partly based on AB 138, in that the parameters and guidelines for the POBOR program must conform to the changes adopted by the Commission in the Statement of Decision on reconsideration. The Commission's jurisdiction, however, is also based on several requests to amend the parameters and guidelines, pursuant to Government Code section 17557, with respect to activities previously found to constitute reasonable methods of complying with the mandate. Thus, the Commission has jurisdiction to address all the amendments proposed by the State Controller's Office with respect to the reimbursable activities.

[19] SCO proposal of June 29, 2006, page 2.

[20] Exhibit F.

[21] Exhibit J.

[22] Administrative Record for CSM 4499, pp. 1455-1456.

[23] Administrative Record for CSM 4499, p. 1453.

BSA describes the key elements to an adequate time study as follows:

> Key elements of an adequate time study include having employees who are conducting the reimbursable activities track the actual time they spend when they are conducting each activity, recording the activities over a reasonable period of time, maintaining documentation that reflects the results, and periodically considering whether the results continue to be representative of current processes.[24]

Based on the BSA recommendation, staff has included the following language under Section IV. Reimbursable Activities:

> Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

In response to the draft staff analysis, the County of Los Angeles contends that the Commission should approve its time survey forms and instructions with respect to the activities performed by the agency's Unit Level, Internal Affairs, and Administrative Appeals unit, and make them applicable to the time studies used by all claimants.[25] The County of Los Angeles proposes the following language:

> Claimants may use Unit Level, Internal Affairs, and Administrative Appeals time studies to support salary and benefit costs for reimbursable activities of a repetitive nature. Time study usage is subject to the time study guidelines included in the State Controller's claiming instructions. The addendum contains acceptable formats and instructions for recording Unit Level, Internal Affairs, and Administrative Appeals time in performing reimbursable activities.

Staff has not included the language proposed by the State Controller's Office or the County of Los Angeles because the Controller has independent authority to issue time study guidelines and approve time studies when issuing claiming instructions and auditing reimbursement claims. (Gov. Code, §§ 17560 and 17561.) The Commission has no authority to approve the State Controller's time study guidelines at the parameters and guidelines stage.

Section IV. A, Administrative Activities

Section IV. A (2)

Section IV. A (2) currently authorizes reimbursement for the following activity: "Attendance at specific training for human resources, law enforcement, and legal counsel regarding the requirements of the mandate."

SCO requests the addition of the following sentence to Section IV. A (2): "The training must relate to mandate-reimbursable activities."

Staff finds that the proposed language is consistent with the Commission's findings when adopting the parameters and guidelines by limiting reimbursement for training "regarding the

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[24] *Ibid.*

[25] Exhibit J.

requirements of the mandate." Thus, staff recommends that the Commission add the proposed language to Section IV. A (2).

Section IV. A (3)

Section IV. A (3) currently states the following: "Updating the status of the POBOR cases."

SCO requests that Section IV. A (3) be amended as follows (proposed language is underlined):

> Updating the status report of mandate-reimbursable POBOR cases. The updating relates to tracking the procedural status of cases. It does not relate to maintaining or updating the cases (e.g. setting up, reviewing, evaluating, or closing the cases).

In response to the SCO proposal, the City of Sacramento and the City of Los Angeles filed comments contending that the proposal is too narrow because of the time constraints imposed by the POBOR legislation.[26] The City of Sacramento states the following:

> The proposal concerning administrative activities and updating the cases is much too narrowly drawn. There are strict time constraints imposed by POBOR: if the time limits are not met, the case must be dismissed and no discipline can be imposed. Therefore, not only must the case filed be updated, but they must be reviewed in order to make sure that all deadlines have been met. To restrict the language as desired by the Controller would make it next to impossible to assure that the time limits set forth in POBOR are met. In order to make sure that the time lines are met, the case must be reviewed at various points in order to make sure that all investigations are completed, as well as to make sure all interrogations are completed timely. This is reasonably necessary in order to make sure that the time lines are met.

Staff finds that the City's comments go beyond the scope of the test claim statutes and are not consistent with the Commission's findings in the Statement of Decision on reconsideration. As indicated in footnote 5, page 6 of the Commission's Statement of Decision on reconsideration (05-RL-4499-01), the POBOR Act has been subsequently amended by the Legislature. One of those amendments imposed the time limitations described by the City.[27] The subsequent amendments were not pled in this test claim and, thus, they were not analyzed to determine whether they impose reimbursable state-mandated activities within the meaning of article XIII B, section 6. The City's arguments relating to the time limitations imposed by subsequent legislation are outside the scope of the Commission's decision in POBOR (CSM 4499). Thus, the City's rationale is not consistent with the Commission's findings.

Staff further finds that the SCO proposal is consistent with the Commission's findings when it adopted the parameters and guidelines. The Commission adopted the following finding:

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[26] Exhibits G and J.

[27] Statutes 1997, chapter 148.

The claimant's proposed parameters and guidelines include the following administrative activities:

> [¶]
>
> 3. Maintenance of the systems to conduct mandated activities.
>
> [¶

The Department of Finance states that the component "maintenance of the systems to conduct the mandated activities" is too ambiguous. Staff agrees.

Before the test claim legislation was enacted, local law enforcement agencies were conducting investigations, issuing disciplinary actions, and maintaining files for those cases. Thus, the component "maintenance of the systems to conduct the mandated activities" is too broad. Accordingly, staff has modified this component to provide that claimants are eligible for reimbursement for "updating the status report of the POBOR cases."[28]

Staff has clarified the activity and added the following proposed language to Section IV. C (3):

> Updating the status report of ~~the~~ mandate-reimbursable POBOR ~~cases~~ activities. "Updating the status report of mandate-reimbursable POBOR ~~cases~~ activities" means tracking the procedural status of ~~cases~~ the mandate-reimbursable activities only. Reimbursement is not required to maintain or update the cases, set up the cases, review the cases, evaluate the cases, or close the cases.

Section IV. B, Administrative Appeal

Government Code section 3304 gives specified officers the right to request an administrative appeal hearing when any punitive action is taken against the officer, or the officer is denied promotion on grounds other than merit. Government Code section 3304 states that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary,[29] written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[30] Thus, in transfer

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[28] Item 10, July 27, 2000 Commission Hearing (Administrative Record ("AR") for CSM 4499, p. 901.)

[29] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[30] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[31]

As indicated on page 30 of the Commission's Statement of Decision on reconsideration (05-RL-4499-01), the Legislature amended Government Code section 3304 in 1998 by limiting the right to an administrative appeal to only those peace officers "who [have] successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.) Thus, as of January 1, 1999, providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) is no longer a reimbursable state-mandated activity. Therefore, staff proposes that Section IV. B be amended to clarify that the right to an administrative appeal applies only to permanent peace officers, as specifically defined in Government Code section 3301,[32] and to chiefs of police that are removed from office under the circumstances specified in the Statement of Decision.

In response to the draft staff analysis, the City of Sacramento argues that under POBOR, all chiefs of police are entitled to a written notice, the reason for removal, and the opportunity for an administrative appeal, regardless of whether the reason for removal involves a liberty interest.[33] Under the POBOR statutes, the City is correct. However, the Commission found in the Statement of Decision on reconsideration that reimbursement was not required when the charges supporting the dismissal of a chief of police constitute moral turpitude, which harms the employee's reputation and ability to find future employment, since a due process hearing was already required under prior state and federal law. Thus, with respect to the removal of the chief of police, Government Code section 3304 constitutes a reimbursable state-mandated activity only when local officials want to remove the chief of police under circumstances that ***do not*** create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment). This finding is binding on the parties.[34]

The SCO further requests that the last paragraph in Section IV. B (1) and (2) be amended to clarify that reimbursement for the administrative appeal begins only after the peace officer requests an administrative appeal, and does not include the costs for the investigation or preparation of charges that were incurred before the officer requested the appeal. SCO further

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[31] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[32] Pursuant to Government Code section 3301, POBOR applies to peace officers as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5. POBOR does not apply to reserve or recruit officers, coroners, railroad police officers commissioned by the Governor, or non-sworn officers including custodial officers and sheriff security officers or police security officers. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

[33] Exhibit J.

[34] *Heap, supra,* 6 Cal.2d 405, 407.

proposes to clarify that litigation costs incurred in any court challenge to the administrative decision are not reimbursable. The SCO proposal is as follows:

> ~~Included in the~~ The foregoing includes only ~~are~~ the preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing~~s~~, exclusive of prior preparation, review, and investigation costs. This includes legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body. The foregoing does not include activities such as writing and reviewing charges that occurred before the officer requested an administrative appeal or defending a lawsuit attacking the validity of the final administrative decision.

In response to the SCO request, the City of Sacramento argues that:

> This proposal is much too narrowly drawn. Administrative appeal applies only to those situations where a hearing is not required by *Skelly*. Accordingly, prior preparation, review and investigative costs are necessary. Absent POBOR, these hearings would not take place at all. Thus, investigation and case preparation is imperative. So, too, defense of litigation is also reasonably necessary. If the employer wins at the administrative level and the employee wishes to contest, the only alternative is litigation.[35]

For the reasons below, staff finds that the SCO proposal is consistent with the test claim legislation and the Commission's decisions. Staff has modified the proposal, however, to clarify the activities that are not reimbursable.

Government Code section 3304 gives the officer the right to request an administrative appeal when any punitive action, as defined by Government Code section 3303, is taken against the officer, or the officer is denied promotion on grounds other than merit.[36] The courts have concluded that the "limited purpose" of the administrative appeal is to provide the officer with a chance to establish a formal record of circumstances surrounding the punitive action and to attempt to convince the employing agency to reverse its decision.[37] Government Code section 3304 does not require an agency to investigate or impose disciplinary action against peace officer employees. When adopting the parameters and guidelines, the Commission concluded that:

> Local agencies were issuing disciplinary actions before the test claim legislation was enacted. All that Government Code section 3304, subdivision (b), did was to require the local agency to provide the procedural protection of an administrative appeal for specified disciplinary actions.[38]

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[35] Exhibit G.

[36] See summary in *Baggett v. Gates* (1982) 32 Cal.3d 128, 135.

[37] *Riveros v. City of Los Angeles* (1996) 41 Cal.App.4 th1342, 1359.

[38] Item 10, July 27, 2000 Commission Hearing (AR for CSM 4499, p. 903).

As determined by the Commission in the Statement of Decision on reconsideration: "POBOR deals with labor relations. It does not interfere with the employer's right to manage and control its own police department."[39] The Second District Court of Appeal also determined that POBOR is not intended to interfere with a local agency's right to regulate peace officers' qualifications for employment or the causes for which such peace officers may be removed.[40]

Thus, the SCO is correct in concluding that investigation costs to prepare disciplinary charges, or costs to take punitive action against an officer are not reimbursable.

Moreover, the SCO's request to clarify that litigation costs are not reimbursable is consistent with the Commission's findings when it adopted the parameters and guidelines, expressly denying reimbursement for litigation costs.[41]

Thus, proposed Section IV. B, Administrative Activities, states the following:

B. Administrative Appeal

1. ~~Reimbursement period of July 1, 1994 through December 31, 1998 –~~ The administrative appeal activities listed below apply to permanent peace officer employees~~, at-will employees, and probationary employees.~~ as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5. The administrative appeal activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, or school security officers.

The following activities and costs are reimbursable:

a. Providing the opportunity for, and the conduct of an administrative appeal hearing for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- ~~dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interests are not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment)~~;
- transfer of permanent~~, probationary and at-will~~ employees for purposes of punishment;
- denial of promotion for permanent~~, probationary and at-will~~ employees for reasons other than merit; and
- other actions against permanent~~, probationary and at-will~~ employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

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[39] Statement of Decision on reconsideration adopted April 26, 2006, page 39, citing to *Sulier v. State Personnel Bd.* (2004) 125 Cal.App.4th 21, 26, and *Baggett, supra*, 32 Cal.3d 128, 125.

[40] *Binkley v. City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806.

[41] Item 10, July 27, 2000 Commission hearing (AR for CSM 4499, pp. 901-905).

b. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

c. Legal review and assistance with the conduct of the administrative appeal hearing.

d. Preparation and service of subpoenas.

e. Preparation and service of any rulings or orders of the administrative appeal hearing body.

f. The cost of witness fees.

g. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.[42]

~~Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.~~

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the peace officer.

d. Litigating the final administrative decision.

2. ~~Reimbursement period beginning January 1, 1999 – The administrative appeal activities listed below apply to permanent employees and the Chief of Police.~~

Providing the opportunity for, and the conduct of an administrative appeal ~~for the following disciplinary actions~~ hearing for removal of the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment). (Gov. Code, § 3304, subd. (b))~~:~~

- ~~Dismissal, demotion, suspension, salary reduction or written reprimand received by the Chief of Police whose liberty interest is not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);~~
- ~~Transfer of permanent employees for purposes of punishment;~~
- ~~Denial of promotion for permanent employees for reasons other than merit; and~~

[42] The City of Sacramento, in comments to the draft staff analysis, argues that "no costs of the administrative appeal panel are included." The time and labor of the administrative appeal hearing body and its attendant clerical services has always been eligible for reimbursement, and remains eligible for reimbursement under this staff recommendation.

- ~~Other actions against permanent employees or the Chief of Police that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee~~.

~~Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.~~

The following activities and costs are reimbursable:

a. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

b. Legal review and assistance with the conduct of the administrative appeal hearing.

c. Preparation and service of subpoenas.

d. Preparation and service of any rulings or orders of the administrative appeal hearing body.

e. The cost of witness fees.

f. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the chief of police.

d. Litigating the final administrative decision.

The City of Sacramento, in comments to the draft staff analysis, also requests reimbursement for witness preparation and locating and finding witnesses. The City of Sacramento has not filed a request to amend the parameters and guidelines pursuant to Government Code section 17557 and the City's comments have not gone out for comment as required by the Commission's regulations. Thus, the Commission does not have jurisdiction to consider these requests.

Section IV. C, Interrogations

Introductory Paragraphs in Section IV. C

Government Code section 3303 prescribes procedural protections that apply when a peace officer is interrogated in the course of an administrative investigation that might subject the officer to the punitive actions listed in the section (dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment). The introductory paragraphs to Section IV. C of the parameters and guidelines state the following:

> Claimants are eligible for reimbursement for the performance of the activities listed in this section only when a peace officer is under investigation, or becomes

a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)

Claimants are not eligible for reimbursement for the activities listed in this section when an interrogation of a peace officer is in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. Claimants are also not eligible for reimbursement when the investigation is concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)

The SCO proposes the addition of the following three paragraphs to the introduction to clarify that the costs to investigate and review the allegations, costs to conduct the interrogation, and case finalization costs are not reimbursable:

Claimants are not eligible for reimbursement for activities occurring prior to the assignment of the case to an administrative investigator, e.g., taking the initial complaint; setting up the complaint file; interviewing parties; or reviewing the file and determining whether it warrants an administrative investigation.

Claimants are not eligible for investigative activities, e.g., assigning an investigator, reviewing the allegation, communicating with other departments, visiting the scene of the alleged incident, gathering evidence, identifying and contacting complainants and witnesses, preparing of the interrogation, reviewing and preparing interview questions, conducting the interrogation, or reviewing the responses given by the officers and/or witnesses.

Claimants are also not eligible for case finalization costs, e.g., preparing case summary disposition reports, closing the case file, or attending executive review or committee hearings related to the investigation.

The County of San Bernardino, the City of Sacramento, and the City of Los Angeles contend that investigation costs and the cost to conduct the interrogation are reimbursable.

However, as identified below, the Commission has already rejected the arguments raised by the County and Cities for reimbursement of investigation costs and the cost to conduct the interrogation. Thus, staff finds that the SCO proposal is consistent with the Commission findings when adopting the parameters and guidelines and the Statement of Decision on reconsideration.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate and review complaints or to conduct interrogations. The Commission adopted the following findings when adopting the parameters and guidelines:

The Commission's Statement of Decision includes the following reimbursable activity:

> Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

This activity was derived from Government Code section 3303, subdivision (a), which establishes the timing and compensation of a peace officer subject to an interrogation. Section 3303, subdivision (a), requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the normal waking hours of the peace officer, unless the seriousness of the investigation requires otherwise. At the test claim phase, the claimant contended that this section resulted in the payment of overtime to the peace officer employee. (See page 12 of the Commission's Statement of Decision.)

The claimant's proposed parameters and guidelines restate the activity as expressed in the Statement of Decision, but also add "the review of the necessity for the questioning and responses given" as a reimbursable component. The claimant's proposed parameters and guidelines state the following:

> Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
>
> Included in the foregoing, but not limited thereto, is the *review of the necessity for the questioning and responses given*; providing notice to all parties concerned of the time and place of the interview and scheduling thereof; preparation and review of overtime compensation requests; review of proceedings by counsel. (Emphasis added.)

Following the pre-hearing conference in this case, staff requested further comments on the proposed activity "to review the necessity for the questioning and responses given" to determine if the activity was consistent with, and/or reasonably related to, the Commission's Statement of Decision and the activities mandated by the test claim legislation.

In response to staff's request, the claimant asserts that it is more difficult to prepare for an investigation under POBOR because Government Code section 3303, subdivision (c), requires that the employee receive prior notice identifying the nature and subject of the questioning. The claimant states the following:

> It is more difficult to prepare for an investigation involving a peace officer than it is for those who are not entitled to POBOR rights. In the normal due process case involving an employee who is not entitled to POBOR rights, you do not have to inform the employee about the nature and subject of the questioning, and you do not have to prepare questions focused upon a particular area, seeking to get the information you can from the employee. In non-POBOR matters, you can explore other areas

[quote continued] in the questioning as they arise, which allows for a much more free-form questioning process.

In contrast, however, with employees covered by POBOR, you must tell the employee prior to the initial questioning what the purpose of the meeting is, what it is you will be discussing with him or her, and you have to be prepared to be clearly on point as to where you are going and your expectations about the questioning process. You cannot engage in broader questioning for information, because the employee has the right to know the subject about which he or she is being interrogated. [Footnote omitted.]

The claimant further states the following:

As any peace officer who is a witness in the course of one individual's investigation could become the subject of their own investigation, it is imperative to do more preparation prior to the initial questioning. We now perform a more complete review to ascertain that witnesses who may become subjects are identified prior to interrogation. . . .

Obviously, if you are going to re-interview a peace officer, you have to be prepared to give them a copy of their prior transcript. You also have to go back and review it, to make sure where conflicts with what transpired previously in order to ask intelligent questions. In a non-POBOR matter, you can follow up by asking additional questions without regard to the reasons you have the employee in for questioning in the first place. However, with POBOR, the whole questioning is focused on what you have identified as the allegation. Thus, the definition of what the allegations are must come early in the process. If someone calls to complain about something, the subsequent investigation may bring to light little about the complaint of the citizen, but may demonstrate an internal operating problem or conflict which you have to address. The additional rights granted by POBOR make that more difficult as indicated above. [Footnote omitted.]

Staff finds that the activity to review the necessity for the questioning and responses given is too broad and goes beyond the scope of Government Code section 3303, subdivision (a), and the Commission's Statement of Decision.

Government Code section 3303, subdivision (a), addresses only the compensation and timing of the interrogation. It does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review the responses given by the officers and/or witnesses, as implied by the claimant's proposed language. Certainly, local agencies were performing these investigative activities before POBOR was enacted.[43]

[43] Item 10, July 27, 2000 Commission Hearing (AR for CSM 4499, p. 911-912).

In the Statement of Decision on reconsideration, the Commission concluded that the POBOR activities are not triggered until the local agency or school district decides to interrogate the officer, take punitive action against the officer, or place an adverse comment in the officer's personnel file. These initial decisions are not expressly mandated by state law, but are governed by local policy, ordinance, city charter, or memorandum of understanding.[44] In *Baggett v. Gates*, the Supreme Court clarified that POBOR *does not:* (1) interfere with the setting of peace officers' compensation; (2) regulate qualifications for employment; (3) regulate the manner, method, times, or terms for which a peace officer shall be elected or appointed; or (4) affect the tenure of office or purpose to regulate or specify the causes for which a peace officer can be removed. These are local decisions. The court found that POBOR only impinges on the local entity's implied power to determine the *manner* in which an employee can be disciplined.[45]

On pages 38 and 39 of the Statement of Decision on reconsideration, the Commission expressly concluded that conducting the interrogation and investigative time are *not* reimbursable:

> In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.
>
> The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.
>
> The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted ..." to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:
>
> > The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or

[44] Statement of Decision on reconsideration, page 14.

[45] *Baggett v. Gates* (1982) 32 Cal.3d 128, 137-140.

> **[Quote continued.]** during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.
>
> Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation. [Footnote omitted.]
>
> Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations. [Footnote omitted.] It does not interfere with the employer's right to manage and control its own police department. [Footnote omitted.]

The findings made by the Commission in the Statement of Decision on reconsideration are final and are binding on the parties. It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void.[46]

Thus, staff finds that SCO's proposed language is consistent with the Commission's findings. Staff recommends, however, that the language proposed by the SCO be made more specific. Staff recommends that the first introductory paragraph be modified to incorporate that language of Government Code section 3301, which specifically identifies the officers entitled to the procedural protections under POBOR when the employing agency wants to interrogate the officer. The proposed paragraph states the following:

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[46] See, *Heap v. City of Los Angeles* (1936) 6 Cal.2d 405, 407, where the court held that the civil service commission had no jurisdiction to retry a question and make a different finding at a later time; *City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 697, where the court held that whenever a quasi-judicial agency is vested with the authority to decide a question, such decision, when made, is res judicata, and as conclusive of the issues involved in the decision as though the adjudication had been made by the court; and *Save Oxnard Shores v. California Coastal Commission* (1986) 179 Cal.App.3d 140, 143, where the court held that in the absence of express statutory authority, an administrative agency may not change a determination made on the facts presented at a full hearing once the decision becomes final. The Commission's Statement of Decision on reconsideration became final when it was mailed or served on May 1, 2006. (Cal. Code Regs., tit. 2, § 1188.2, subd. (b).)

~~Claimants are eligible for reimbursement for t~~ The performance of the activities listed in this section are eligible for reimbursement only when a peace officer, as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5, is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)

In addition, staff has included the activities that are not reimbursable at the end of Section IV. C as follows:

The following activities are **not** reimbursable:

1. Activities occurring before the assignment of the case to an administrative investigator. These activities include taking an initial complaint, setting up the complaint file, interviewing parties, reviewing the file, and determining whether the complaint warrants an administrative investigation.
2. Investigation activities, including assigning an investigator to the case, reviewing the allegation, communicating with other departments, visiting the scene of the alleged incident, gathering evidence, identifying and contacting complainants and witnesses.
3. Preparing for the interrogation, reviewing and preparing interrogation questions, conducting the interrogation, and reviewing the responses given by the officer and/or witness during the interrogation.
4. Closing the file, including the preparation of a case summary disposition reports and attending executive review or committee hearings related to the investigation.

Section IV. C (1)

Section IV. C (1) currently states the following:

1. When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

   Included in the foregoing is the preparation and review of overtime compensation requests.

The SCO proposes the following amendments to clarify that the interrogators' time to conduct the interrogation is not reimbursable:

1. When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).) Interrogators' time is not reimbursable.

   Included in the foregoing is the preparation and review of overtime compensation requests.

Claimants are not eligible for reimbursement under interrogation when a peace officer being investigated under POBOR is not subjected to an interview or interrogation, but is subject to possible sanctions.

The County of San Bernardino requests, on the other hand, that the parameters and guidelines be amended to authorize reimbursement for conducting the interrogation and the investigating officer's preparation time for the interrogation. The County of San Bernardino proposes the addition of the following italicized language:

> *Conducting an interrogation of a peace officer while the officer is on duty*, or compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code section 3303, subd. (a).)
>
> Included in the foregoing *is the investigating officer's preparation time for the interrogation. Preparation costs are reimbursable to a maximum of 20 hours with appropriate supporting documentation. Also included* is the preparation and review of overtime compensation requests.

Staff finds that SCO's proposed sentence that states, "Interrogators' time is not reimbursable" is consistent with the Commission's findings when adopting the parameters and guidelines. When the claimant submitted its proposed parameters and guidelines, it requested reimbursement for "conducting an interrogation of a peace officer while the officer is on duty."[47] The Commission disagreed that conducting the interrogation was reimbursable. The Commission found that the test claim legislation does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review the responses given. Local agencies were conducting interrogations before the enactment of the test claim legislation.[48]

These findings were also included in the Statement of Decision on reconsideration. On pages 38 and 39 of the Statement of Decision on reconsideration, the Commission expressly concluded that conducting the interrogation and investigative time are *not* reimbursable:

> In comments to the draft staff analysis, the Counties of Orange, Los Angeles, and Alameda, and the City of Sacramento contend that the interrogation of an officer pursuant to the test claim legislation is complicated and requires the employer to fully investigate in order to prepare for the interrogation. The County of Orange further states that "[t]hese investigations can vary in scope and depth from abuses of authority, the use of deadly force, excessive force when injuries may be significant, serious property damage, and criminal behavior." These local agencies are requesting reimbursement for the time to investigate.
>
> The Commission disagrees and finds that investigation services are not reimbursable. First, investigation of criminal behavior is specifically excluded from the requirements of Government Code section 3303. Government Code section 3303, subdivision (i), states that the interrogation requirements do not apply to an investigation concerned solely and directly with alleged criminal

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[47] Item 10, July 27, 2000 Commission Hearing (AR for CSM 4499, p. 965.)

[48] Administrative Record for CSM 4499, page 912.

activities. Moreover, article XIII B, section 6, subdivision (a)(2), and Government Code section 17556, subdivision (g), state that no reimbursement is required for the enforcement of a crime.

The County of Los Angeles supports the argument that reimbursement for investigative services is required by citing Penal Code section 832.5, which states that each department that employs peace officers shall establish a procedure to investigate complaints. Penal Code section 832.5, however, was not included in this test claim, and the Commission makes no findings on that statute. The County of Los Angeles also cites to the phrase in Government Code section 3303, subdivision (a), which states that "[t]he interrogation shall be conducted ..." to argue that investigation is required. The County takes the phrase out of context. Government Code section 3303, subdivision (a), states the following:

> The interrogation shall be conducted at a reasonable hour, preferably at a time when the public safety officer is on duty, or during the normal waking hours for the public safety officer, unless the seriousness of the investigation requires otherwise. If the interrogation does occur during off-duty time of the public safety officer being interrogated, the public safety officer shall be compensated for any off-duty time in accordance with regular department procedures, and the public safety officer shall not be released from employment for any work missed.

Government Code section 3303, subdivision (a), establishes the timing of the interrogation, and requires the employer to compensate the interrogated officer if the interrogation takes place during off-duty time. In other words, the statute defines the process that is due the peace officer who is subject to an interrogation. This statute does not require the employer to investigate complaints. When adopting parameters and guidelines for this program, the Commission recognized that Government Code section 3303 does not impose new mandated requirements to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review responses given by officers and/or witnesses to an investigation. [Footnote omitted.]

Thus, investigation services go beyond the scope of the test claim legislation and are ***not*** reimbursable. As explained by the courts, POBOR deals with labor relations. [Footnote omitted.] It does not interfere with the employer's right to manage and control its own police department. [Footnote omitted.]

These findings are binding on the parties.[49] Thus, staff has added the following proposed language at the end of Section IV. to identify the activities that are not reimbursable.

> Preparing for the interrogation, reviewing and preparing interrogation questions, conducting the interrogation, and reviewing the responses given by the officer and/or witness during the interrogation.

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[49] *Heap, supra*, 6 Cal.2d 405, 407.

However, staff finds that the SCO's second proposed sentence is vague and ambiguous, and may already be covered by the parameters and guidelines. The second proposed sentence states that: "Claimants are not eligible for reimbursement under interrogation when a peace officer being investigated under POBOR is not subjected to an interview or interrogation, but is subject to possible sanctions." The City of Sacramento argues that this sentence:

> ...makes no sense whatsoever. It may be possible during the investigation and interrogation of other officers to ascertain that the officer, who is the subject of the investigation, did not commit the misconduct at issue, but was done by another officer. If the interrogation involves a witness officer, to whom the POBOR rights attach, the interrogation should be compensable."

When adopting the parameters and guidelines, the Commission concluded that the rights under Government Code section 3303 attach when a peace officer is interrogated as a witness to an incident, even if the officer is not under investigation since the officer's own actions regarding the incident can result in punitive action following the interrogation.[50] Thus, the Commission included the following language in the parameters and guidelines:

> Claimants are eligible for reimbursement for the performance of the activities listed in this section only when a peace officer is under investigation, *or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment.* (Gov. Code, § 3303.) (Emphasis added.)

Although the SCO's proposed language appears to clarify that reimbursement for the activities identified in the parameters and guidelines is not required when the peace officer witness is not subject to an interrogation, the italicized language above already addresses that issue. Thus, staff has not included the second proposed language in the parameters and guidelines.

Accordingly, staff proposes the following amendments to Section IV. (C)(1):

The following activities are reimbursable:

1. When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

   ~~Included in the foregoing is the~~ pPreparation and review of overtime compensation requests are reimbursable.

Section IV. C (2)

Section IV. C (2) currently states the following:

2. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)

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[50] Item 10, July 27, 2000 Commission Hearing (AR for CSM 4499, pp. 908-910.)

> Included in the foregoing is the review of agency complaints or other documents to prepare the notice of interrogation; determination of the investigating officers; redaction of the agency complaint for names of the complainant or other accused parties or witnesses or confidential information; preparation of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer.

The SCO requests the following amendments to the second paragraph:

> Included in the foregoing is the review of agency complaints or other documents to prepare the notice of interrogation; identification ~~determination~~ of the investigating officers; redaction of the agency complaint for names of the complainant or other accused parties or witnesses or of other confidential information; preparation of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer.

The City of Sacramento contends that the SCO proposal is too limited. The City argues that:

> ... it is imperative that it not be just the identification of the investigating officers, but determining who will, in fact, do the questioning. Often determining the investigating officer will have an impact on the outcome of the questioning. Accordingly, limiting the notice to just identifying the questioning officers is far too limited.

Staff agrees that the word "determination" is too broad and goes beyond the procedural protection required by Government Code section 3303, subdivisions (b) and (c). Subdivisions (b) and (c) require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the "identity" of all officers participating in the interrogation. Government Code section 3303, subdivisions (b) and (c), state the following:

> (b) The public safety officer under investigation shall be informed prior to the interrogation of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. All questions directed to the public safety officer under interrogation shall be asked by and through no more than two interrogators at one time.
>
> (c) The public safety officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

The verb "determine" means "to establish or ascertain definitely, as after consideration, investigation, or calculation.[51] To "identify" means "to establish the identity of."[52] Government Code section 3303, subdivision (c), simply requires the agency to provide the officer with notice identifying the interrogating officers. It does not require the agency to investigate or determine who the officer will be. As determined by the Commission,

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[51] Webster's II New College Dictionary, page 308.

[52] *Id.* at page 548.

Government Code section 3303 does not require the local agency to investigate an allegation, prepare for the interrogation, conduct the interrogation, or review the responses given.[53]

Thus, staff recommends that the Commission change the word "determination" to "identification" in the parameters and guidelines.

Staff also recommends the Commission delete the activities redacting the agency complaint for names of the complainant, parties, or witnesses, and preparing the agency complaint. These activities go beyond the scope of Government Code section 3303, subdivisions (c) and (d), and the Commission's Statement of Decision finding that the activity of providing notice before the interrogation was reimbursable.

Accordingly, staff proposes the following amendments:

2. Providing ~~prior~~ notice to the peace officer before the interrogation. ~~regarding the nature of the interrogation and identification of the investigating officers.~~ (Gov. Code, § 3303, subds. (b) and (c).) The notice shall inform the peace officer of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be present during the interrogation. The notice shall inform the peace officer of the nature of the investigation.

   ~~Included in the foregoing is the review of agency complaints or other documents to prepare the notice of interrogation; determination of the investigating officers; redaction of the agency complaint for names of the complainant or other accused parties or witnesses or confidential information; preparation of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer.~~

   The following activities are reimbursable:

   a. Review of agency complaints or other documents to prepare the notice of interrogation.
   b. Identification of the interrogating officers to include in the notice of interrogation.
   c. Preparation of the notice.
   d. Review of the notice by counsel.
   e. Providing notice to the peace officer prior to interrogation.

Section IV. C (3), (4), and (5)

Section IV. C (3) states the following:

3. Tape recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

   Included in the foregoing is the cost of tape and storage, and the cost of transcription.

[53] Statement of Decision on reconsideration, page 39.

The SCO proposes that Section IV. C (3) be amended as follows:

3. ~~Tape~~ rRecording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

   Included in the foregoing is the cost of ~~tape~~ media and storage, and the cost of transcription. Excluded is the investigator's time to record the session and transcription costs of non-sworn and peace officer complainant(s).

The SCO also proposes to delete the word "tape" before "recording" in Section IV. C (4) and (5).

The County of San Bernardino and the City of Sacramento agree with the deletion of the word "tape" in Section IV. C (3), (4), and (5), since they recognize that agencies use other media for recording. Staff agrees and recommends that the Commission adopt the SCO proposal to delete the word "tape."

However, the City of Sacramento contends that the costs to record the interrogation and the transcription costs of peace officer complainants are reimbursable. The City argues as follows:

> We have no problem with eliminating the word "tape" concerning recording, as we understand that other agencies use various media for the recordation. However, we want to make clear that the recordation of the interrogation, regardless of the media, is found to be reimbursable.
>
> We do, however, have a problem with excluding the transcription cost of any peace officer complainant(s). When a peace officer complains, that officer is nonetheless afforded POBOR rights, in the event that something he or she says may result in discipline for misfeasance, or more probably, nonfeasance.

Staff finds that the SCO proposed language clarifies that the investigator's time to record the interrogation is not reimbursable. The proposed language is consistent with the record and the Commission's findings in the Statement of Decision (CSM 4499). Page 859 of the record for CSM 4499 is the Commission's Statement of Decision, dated November 30, 1999, on the issue of tape recording the interrogation. Based on testimony of the claimant, the Commission approved reimbursement for tape recording the interrogation when the employee records the interrogation. According to the claimant, a tape recorder is simply placed on a desk by the interrogator during the interrogation.[54] When the claimant submitted its proposed parameters and guidelines, it requested reimbursement for "conducting an interrogation of a peace officer while the officer is on duty."[55] The Commission disagreed that conducting the interrogation was reimbursable. The Commission adopted the staff finding and recommendation that the test claim legislation does not require local agencies to investigate an allegation, prepare for the interrogation, conduct the interrogation, and review the responses given.[56] Thus, reimbursement for the salary of the individual or individuals conducting the interrogation is not reimbursable. The Commission included this finding in the Statement of Decision on reconsideration.[57]

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[54] Administrative Record for CSM 4499, page 873.

[55] Administrative Record for CSM 4499, page 965.

[56] Administrative Record for CSM 4499, page 912.

[57] Statement of Decision on reconsideration, pages 38 and 39.

Staff further agrees with the SCO that any costs incurred for non-sworn officers are not reimbursable. By the terms set forth in Government Code section 3301, POBOR expressly applies to "peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5 of the Penal Code." The legislation, however, does not apply to reserve or recruit officers,[58] coroners, or railroad police officers commissioned by the Governor. Non-sworn officers, such as custodial officers and sheriff's or police security officers, are not "peace officers."[59] The Legislature has made clear, in Penal Code section 831.4, subdivision (b), that "[a] sheriff's or police security officer is not a peace officer nor a public safety officer as defined in Section 3301 of the Government Code [POBOR]."

Thus, staff recommends that the word "tape" be deleted from Sections IV. (C)(3), (4), and (5), and that Section IV. (C)(3) be further amended as follows:

3. ~~Tape~~ ~~r~~Recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

   ~~Included in the foregoing is the~~ The cost of ~~tape~~ media and storage, and the cost of transcription are reimbursable. The investigator's time to record the session and transcription costs of non-sworn and peace officers are **not** reimbursable.

Section IV. D, Adverse Comment

Government Code sections 3305 and 3306 provide that no peace officer shall have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment. If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

As indicated on page 42 of the Commission's Statement of Decision on reconsideration, the Commission, based on the Supreme Court's decision in *San Diego Unified School District v. Commission on State Mandates* (2004) 33 Cal.4th 859, 888-889, denied the activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause as follows:

> The Commission finds that obtaining the officer's signature on the adverse comment or indicating the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause, are designed to prove that the officer was on notice about the adverse comment. Since providing notice is already guaranteed by the due process clause of the state and federal constitutions under these circumstances, the Commission finds that the obtaining the signature of the officer or noting the officer's refusal to sign the adverse comment is part and parcel of the federal notice mandate and results in "de minimis" costs to local government.

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[58] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569.

[59] Penal Code sections 831, 831.4.

Therefore, the Commission finds that, under current law, the Commission's conclusion that obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, when the adverse comment results in a punitive action protected by the due process clause is not a new program or higher level of service and does not impose costs mandated by the state. Thus, the Commission denies reimbursement for these activities.

Staff recommends that the Commission amend the parameters and guidelines to delete these activities.

The SCO also proposes to amend the introductory paragraph to Section IV. D, as follows:

> ~~Perform the following limited activities upon receipt of an adverse comment.~~ The following limited reimbursable activities pertain to peace officers recommended for an adverse comment. (Gov. Code, §§ 3305 and 3306).

The SCO further requests that the following language be added to the end of Section IV. D:

> The foregoing relates only to peace officers investigated under POBOR who were subjected to an adverse comment by investigation staff. Reimbursement is limited to activities that occurred subsequent to the completion of a case that resulted in an adverse comment recommendation. Reimbursable activities are limited to providing notice of the adverse comment to the peace officer and providing the officer an opportunity to review, sign, and respond to the adverse comment. Such activities include a limited review of the circumstances or documentation leading to an adverse comment recommendation by supervisor, command staff, human resources staff, or counsel to determine whether the recommendation constitutes an adverse comment or a written reprimand; preparation and review for accuracy of adverse comment notice; notification and presentation of adverse comment to officer and notification concerning rights regarding the notice; review of officer's response to the adverse comment, and attachment of response to the adverse comment and its filing.
>
> A complaint is not an adverse comment. The foregoing does not include any activities related to investigating a complaint, which is part of the investigative process. Activities such as, but not limited to, determining whether a complaint is valid and may lead to an adverse comment and/or possible criminal offense, interviewing the complainant, and preparing the complaint investigation report are not reimbursable.

Staff finds that the SCO's proposal to limit reimbursement to those activities occurring after an officer is investigated that results in a "recommended" adverse comment is not consistent with the test claim legislation and the Commission's decision on reconsideration. Pursuant to Government Code section 3305, an officer has the right to notice and to provide a response when "any" adverse comment is placed in the officer's personnel file. When interpreting this statute, the Third District Court of Appeal, in *Sacramento Police Officers Association v. Venegas*, concluded that an adverse comment includes any document that creates an adverse impression that could influence future personnel decisions, including decisions that do not constitute

discipline or punitive action. The court further found that citizen complaints that are not investigated can be an adverse comment. The court stated the following:

> The events that will trigger an officer's rights under those statutes [sections 3305 and 3306] are not limited to formal disciplinary actions, such as the issuance of letters of reproval or admonishment or specific findings of misconduct. Rather, an officer's rights are triggered by the entry of any adverse comment in a personnel file or any other file used for a personnel purpose. [Citation omitted.]
>
> *Aguilar* [*v. Johnson* (1988)] 202 Cal.App.3d 241, addressed the meaning of an adverse comment for the purposes of sections 3305 and 3306 of the Bill of Rights Act. It noted: "Webster defines comment as 'an observation or remark expressing an opinion or attitude ...' (Webster's Third New Intern. Dict. (1981) p. 456.) 'Adverse' is defined as 'in opposition to one's interest: Detrimental, Unfavorable.' (Id. at p. 31.)" (*Aguilar, supra*, 202 Cal.App.3d at p. 249.) Thus, for example, under the ordinary meaning of the statutory language, a citizen's complaint of brutality is an adverse comment even though it was "uninvestigated" and the chief of police asserted that it would not be considered when personnel decisions are made. (*Id.* at pp. 249-250.)
>
> We find the reasoning in *Aguilar* persuasive, as did the Supreme Court in *County of Riverside, supra,* 27 Cal.4th 793. In its usual and ordinary import, the broad language employed by the Legislature in sections 3305 and 3306 does not limit their reach to comments that have resulted in, or will result in, punitive action against an officer. The Legislature appears to have been concerned with the potential unfairness that may result from an adverse comment that is not accompanied by punitive action and, thus, will escape the procedural protections available during administrative review of a punitive action. As we will explain, even though an adverse comment does not directly result in punitive action, it has the potential of creating an adverse impression that could influence future personnel decisions concerning an officer, including decisions that do not constitute discipline or punitive action. [Citation omitted.][60]

The Commission noted the *Venegas* case on pages 42 and 43 of the Statement of Decision on reconsideration as follows:

> Finally, the courts have been clear that an officer's rights under Government Code sections 3305 and 3306 are not limited to situations where the adverse comment results in a punitive action where the due process clause may apply. Rather, an officer's rights are triggered by the entry of "any" adverse comment in a personnel file, "or any other file used for personnel purposes," that may serve as a basis for affecting the status of the employee's employment.[61] In explaining the point, the Third District Court of Appeal stated: "[E]ven though an adverse comment does not directly result in punitive action, it has the potential for creating an adverse impression that could influence future personnel decisions

[60] *Sacramento Police Officers Association v. Venegas* (2002) 101 Cal.App.4th 916, 925-926.

[61] *Sacramento Police Officers Assn. v. Venegas* (2002) 101 Cal.App.4th 916, 925.

[quote continued] concerning an officer, including decisions that do not constitute discipline or punitive action."[62] Thus, the rights under sections 3305 and 3306 also apply to uninvestigated complaints. Under these circumstances (where the due process clause does not apply), the Commission determined that the Legislature, in statutes enacted before the test claim legislation, established procedures for different local public employees similar to the protections required by Government Code sections 3305 and 3306. Thus, the Commission found no new program or higher level of service to the extent the requirements existed in prior statutory law. The Commission approved the test claim for the activities required by the test claim legislation that were not previously required under statutory law. [Footnote omitted.] Neither *San Diego Unified School Dist.*, nor any other case, conflicts with the Commission's findings in this regard. Therefore, the Commission finds that the denial of activities following the receipt of an adverse comment that were required under prior statutory law, and the approval of activities following the receipt of an adverse comment that were *not* required under prior statutory law, was legally correct.

Thus, staff recommends that the introductory paragraph identify and clarify the officers that receive the right to notice and to respond to an adverse comment under POBOR as follows:

> Performing the following activities upon receipt of an adverse comment <u>concerning a peace officer, as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5</u> (Gov. Code, §§ 3305 and 3306):[63]

Staff further recommends that the end of the adverse comment section clearly identify what is reimbursable and what is not reimbursable as follows:

> ~~Included in the foregoing are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; review of response to adverse comment, attaching same to adverse comment and filing.~~
>
> <u>The following adverse comment activities are reimbursable:</u>
>
> 1. <u>Review of the circumstances or documentation leading to the adverse comment by supervisor, command staff, human resources staff, or counsel to determine whether the comment constitutes a written reprimand or an adverse comment.</u>

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[62] *Id.* at page 926.

[63] The adverse comment activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, or school security officers. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

2. Preparation of notice of adverse comment.
3. Review of notice of adverse comment for accuracy.
4. Informing the peace officer about the officer's rights regarding the notice of adverse comment.
5. Review of peace officer's response to adverse comment.
6. Attaching the peace officers' response to the adverse comment and filing the document in the appropriate file.

The following activities are **not** reimbursable:

1. Investigating a complaint.
2. Interviewing a complainant.
3. Preparing a complaint investigation report.

Sections IV. and V. Reasonable Reimbursement Methodology

Upon adoption of the POBOR Statement of Decision on reconsideration, the Commission directed staff to form a working group to develop a reasonable reimbursement methodology to reimburse local governments for state-mandated costs. The California State Association of Counties (CSAC), the County of Los Angeles, and the DOF filed proposals. If the Commission adopts a reasonable reimbursement methodology, additional language would be added to Sections IV. and V.

In adopting parameters and guidelines, the Commission may adopt a reasonable reimbursement methodology as defined in Government Code section 17518.5.[64]

A reasonable reimbursement methodology is defined in Government Code section 17518.5, as follows:

> (b) "Reasonable reimbursement methodology" means a formula for reimbursing local agency and school district costs mandated by the state that meets the following conditions:
>
> (1) The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.
>
> (c) Whenever possible, a reasonable reimbursement methodology shall be based on general allocation formulas, uniform cost allowances, and other approximations of local costs mandated by the state rather than detailed documentation of actual local costs. In cases when local agencies and school districts are projected to incur costs to implement a mandate over a period of more than one fiscal year, the determination of a reasonable reimbursement methodology may consider local costs and state reimbursements over a period of greater than one fiscal year, but not exceeding 10 years.

[64] Government Code section 17557, subdivision (b).

(d) A reasonable reimbursement methodology may be developed by any of the following:

(1) The Department of Finance.

(2) The State Controller.

(3) An affected state agency.

(4) A claimant.

(5) An interested party.

Issue 1: Is the Commission authorized to develop and propose a reasonable reimbursement methodology, as defined in Government Code section 17518.5?

In comments filed on the draft staff analysis, claimants are critical of the Commission staff's reliance on the statutory definition of reasonable reimbursement methodology. Claimants argue that Commission staff should develop and propose alternatives to the pending proposals.

Government Code section 17518.5 provides that "[a] reasonable reimbursement methodology may be developed by any of the following:

a. The Department of Finance.

b. The State Controller.

c. An affected state agency.

d. A claimant.

e. An interested party."

Based on the plain meaning of the statute, the Department of Finance, the State Controller, an affected state agency, a claimant, or an interested party are authorized to develop a reasonable reimbursement methodology. There is no statutory requirement or authority for the Commission to develop and submit alternatives to reasonable reimbursement methodology proposals.

Issue 2: Is the Commission required to develop "reasonable criteria" that it would accept in order to establish a reasonable reimbursement methodology?

In view of staff's findings that the CSAC and County of Los Angeles proposals for a reasonable reimbursement methodology do not comply with the statutory definition, claimants request that Commission staff develop "reasonable criteria that it would accept in order to establish a reasonable reimbursement methodology."[65]

Government Code section 17518.5 defines reasonable reimbursement methodology as a proposed formula for reimbursing local government costs that meets the following two conditions:

- The total amount to be reimbursed statewide is equivalent to total estimated local agency and school district costs to implement the mandate in a cost-efficient manner.

[65] See Exhibit J, City of Sacramento's Comments on the Draft Staff Analysis, dated September 22, 2006, page 434.

- For 50 percent or more of eligible local agency and school district claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

These conditions or "criteria" are defined in statute and may not be changed by the Commission. However, the Commission may determine what types of evidence it may rely upon to establish these two conditions.

Issue 3: Is the CSAC proposal a "reasonable reimbursement methodology," as defined in Government Code section 17518.5?

Background

CSAC requests that the parameters and guidelines be amended to allow claimants to "calculate the annual claim amount by multiplying the number of peace officers employed by a local agency on January 1 of the claim year by $528 beginning with the 2006-2007 fiscal year. Subsequent year claims shall be adjusted by the implicit price deflator."

The estimate of $528 per officer is derived from a report from the SCO and statistics supplied by Peace Officers Standards and Training (POST). According to CSAC, the SCO report includes the name of the claimants who filed POBOR reimbursement claims for fiscal year 2001-2002, the amount each claimant filed, the number of POBOR cases in progress at the beginning of the fiscal year and the number of POBOR cases added during the fiscal year. CSAC's analysis considers both cases in progress and cases added during the fiscal year. The total number of sworn officers from POST's year 2000 online statistical report was matched with each claimant. Claimants who were missing either the number of cases or number of sworn officers were eliminated from the analysis. The resulting sample consists of 184 claimants.

For each claimant, CSAC divided the actual amount claimed by the total number of sworn officers to determine the cost per officer. The cost per officer for the 184 claimants was totaled, then divided by 184 to establish the $528 average cost per officer.

Comments

The CSAC proposal is supported by the County of Los Angeles, County of San Bernardino, and City of Los Angeles, and is opposed by the DOF and SCO. The City of Sacramento has "no problem" with this proposal.

The City of Los Angeles is critical of the draft staff analysis and its dismissal of "all RRM proposals as submitted for failure to comply with law in that they do not prove that the rate reflects the performance of activities in a cost-efficient manner." The City of Los Angeles believes that "a cost-per-officer approach is the best methodology and should be adopted by the Commission at its hearing with direction to Staff and an invitation to interested parties to work together to achieve a dollar amount to satisfy the Commission." [66]

The City of Sacramento filed the following comments on the draft staff analysis:

- There is no requirement that all claims be audited before an RRM can be adopted.

[66] See Exhibit J, page 419.

- Rather than examining the request of $528/officer, and proposing an alternative that allowed 55% of the total costs or $290.40 per officer, the Commission [staff] denied the [CSAC] request in its entirety.
- The transaction costs to both State and local government in tracking and documenting costs of POBOR are substantial ... the costs to the SCO for its audits is substantial.

In its comments on the draft staff analysis, County of San Bernardino agrees with the comments by the City of Sacramento.[67]

DOF believes that the CSAC proposal would result in payments to local governments for activities that were not deemed reimbursable by the Commission. DOF also notes that the proposed reimbursement rate was developed using data contained in unaudited claims. DOF cites reviews conducted by the Bureau of State Audits (BSA) and the SCO, finding that a large portion of the costs claimed as reimbursable by local agencies may be invalid and/or unsupported.

In its comments on the draft staff analysis, DOF states that it would "prefer a reimbursement methodology that utilizes unit costs or other data to eliminate the need for actual cost reporting. If an alternative reimbursement methodology is adopted by the Commission, Finance recommends that it be the only mechanism for reimbursement of POBOR related activities. Providing an actual cost option could increase state costs by allowing local governments to choose the method yielding the highest reimbursement rate and would hinder efforts to streamline the claims process.[68]

SCO's comments are based on the definition of reimbursable activities in the Statements of Decision, final staff analysis to the parameters and guidelines, and parameters and guidelines, and consistent with the position of the BSA in its published 2003 audit report on POBOR. The SCO is concerned that the CSAC proposal is based on "filed claims rather than on reimbursable activities" adopted by the Commission and that as much as 75% of the $528 rate may be for activities not reimbursable under POBOR.

Analysis

Staff reviewed the CSAC proposal and its underlying documentation and concludes that it is not a reasonable reimbursement methodology because it does not satisfy the conditions specified in Government Code section 17518.5. The statutory definition of reasonable reimbursement methodology requires that the proposed formula for reimbursing local agency and school district costs mandated by the state meets these conditions:

> (1) The total amount to be reimbursed statewide is equivalent to total estimated ... costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible ... claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

[67] See Exhibit J, page 460.

[68] See Exhibit J, page 453.

If CSAC's proposed $528 is applied to 184 eligible claimants and multiplied by 52,914 peace officers employed by these claimants, the total amount to be reimbursed would be approximately $28 million instead of $36 million. Adoption of the CSAC proposal would result in the total amount reimbursed being less than the total amount claimed. However, there is no evidence that the total amount that would be reimbursed is equivalent to total estimated claimant costs to implement the mandate in a *cost-efficient manner*. CSAC's proposal is based on actual costs claimed for the 2001-2002 fiscal year. This is the same fiscal year that is the subject of the 2003 BSA report cited by the SCO and DOF.

The BSA report reviewed the costs claimed for the *Peace Officers Procedural Bill of Rights* mandate. In summary, BSA stated that the local entities reviewed:

> Claimed costs under the peace officer rights mandate for activities that far exceed the Commission on State Mandates (Commission) intent.
>
> Lacked adequate supporting documentation for most of the costs claimed under the peace officer rights mandate....

The BSA results in brief stated,

> ... Based on our review of selected claims under each mandate, we question a high proportion of the costs claimed under the peace officer rights mandate ... In particular, we question $16.2 million of the $19.1 million in direct costs that four local entities claimed under the peace officer rights mandate for fiscal year 2001-02 because they included activities that far exceed the Commission's intent. Although we noted limited circumstances in which the commission's guidance could have been enhanced, the primary factor contributing to this condition was that local entities and their consultants broadly interpreted the Commission's guidance to claim reimbursement for large portions of their disciplinary processes, which the Commission clearly did not intend. . . .[69]

The 184 eligible claimants in the CSAC sample claimed a total of $36,168,183 in fiscal year 2001-2002. The BSA questioned $16.2 million in direct costs claimed by four audited claimants that are included in the CSAC sample. The BSA questioned amount is 45% of the total amount claimed by the CSAC sample that was used to calculate the $528 rate. The BSA audit finding provides evidence that the total amount that would be reimbursed under the CSAC formula is not equivalent to total estimated claimant costs to implement the mandate in a *cost-efficient* manner. Thus, staff finds that the CSAC proposal does not satisfy the first condition.

As to the second condition, if 184 eligible claimants are reimbursed $528 per peace officer, more than 75% of the claimants would be reimbursed *more than* the actual amount claimed and receive an over payment of more than $8 million. Accordingly, staff finds that the amount that would be reimbursed under the CSAC proposal does not fully offset their projected costs to implement the mandate in a *cost-efficient manner* because it would result in overpayment of 75% of the claimants. Thus, staff finds that the CSAC proposal does not satisfy the second condition.

Therefore, staff concludes that the CSAC proposal of $528 per officer is not a reasonable reimbursement methodology because it does not satisfy the conditions required under Government Code section 17518.5.

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[69] Bureau of State Audits Report, see Administrative Record for CSM-4499, page 1412.

Issue 4: Is the County of Los Angeles proposal a reasonable reimbursement methodology, as defined in Government Code section 17518.5?

Background

The County of Los Angeles (LA County) requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology that would allow local agencies to be reimbursed based on approximations of local costs mandated by the state. This proposal is based on studies of claims data submitted to the SCO for the 2001-2002 through 2004-2005 fiscal years. LA County describes its proposal as a reimbursement formula which reflects differences in POBOR case loads among local law enforcement agencies and differences in the numbers of peace officers employed by those agencies. The reasonable reimbursement methodology is comprised of three components: (1) *Unit Case Costs* are determined by multiplying (the number of unit level cases) X (12 standard hours) X (productive hourly rate); (2) *Extended Case Costs* are determined by multiplying (the number of extended cases) X (162 standard hours) X (productive hourly rate); and (3) Uniform Costs are determined by multiplying (the number of peace officers) X (standard rate of $100). The costs from these three components are then totaled for the annual claim amount. Each formula is reviewed below.

1. Unit Case Costs

Number of Unit Cases	X	Standard Hours 12	X	Productive Hourly Rate	=	Total
_____				_____		_____

LA County defines a "unit case" as a POBOR case that requires less than 60 hours of reimbursable activities.

LA County conducted a time study from May-October 2004 to measure the amount of time spent on reimbursable POBOR activities[70] for "unit" level cases initiated during May 2004. According to the narrative, the sample size of 44 cases represented approximately 5% of the average unit level cases filed each year for the past five years. Sheriff's case staff was instructed to record time spent on performing "reimbursable activities," as noted in the POBOR parameters and guidelines. LA County checked the time logs to ensure that activity descriptions were appropriately categorized and evaluated them to ensure that the proper activities were time studied.

From this study, LA County reports that time logs on 18 unit-level POBOR cases resulted in the performance of 12 hours of reimbursable activities. The times reported for a unit level case ranged from a low of two hours (120 minutes) to a high of 57.3 hours (3440 minutes).

Based on this time study, LA County proposes that a standard time of 12 hours be used for reimbursement of "unit level cases."

[70] Review of the circumstances or documentation which led to initiating the POBOR case; conduct of a POBOR investigation including interrogating the officer and witnesses; preparation and review of the complaint or adverse comment for the officer's review and signature.

2 Extended Case Costs

Number of Extended Cases	X	Standard Hours	X	Productive Hourly Rate	=	Total
_____		162		$_____		_____

An "extended case" is defined as a POBOR case that requires more than 60 hours of reimbursable activities. For fiscal year 2003-2004, LA County employees performed 26,405 hours of reimbursable activities on 163 cases. These hours were claimed under the Reimbursable Component of "Interrogations." LA County divided the total number of hours by the number of cases worked to calculate the proposed standard time of 162 hours for each extended case. The lowest average number of hours for an extended case was reported to be 64 hours of reimbursable activities.

3 Uniform Costs

Number of Peace Officers	X	Standard Rate	=	Total
_____		$100		_____

LA County also proposes that each claimant be reimbursed $100 for each peace officer employed by the jurisdiction on January 1st of the claim year.

LA County's Analysis of Summary and Claimant Data

LA County compared summary data based on its proposal with summary SCO data. The SCO data for four years (2001-2002 through 2004-2005) was reformatted to reflect data in ascending order by claimed costs and cases. (See Schedule 9 on page 8 of LA County's filing, dated June 15, 2006.)

A sample of nineteen additional claimants was developed and costs were calculated based on the application of the reimbursement methodology. The costs were computed by multiplying the number of cases reported to the SCO by the standard times proposed. A productive hourly rate of $70 was used for unit cases and $60 for extended cases. It was assumed that 90% of the cases reported to the SCO were unit-level cases and 10% were extended-level cases. (See Schedules 6-7 on pages 10-11 of their filing dated June 15, 2006 for detail.) LA County concludes that of the 19 claimants sampled, reimbursement methodology (RRM) costs for nine claimants were less than those claimed and RRM calculated costs for another nine claimants were more than those claimed. For one claimant, the RRM calculated cost was equivalent to claimed cost.

Comments

The City of Sacramento has "no problems" with the LA County proposal.[71] In comments filed on the draft staff analysis, the City of Sacramento notes that the "Commission Staff adopts the criticisms of the State Controller, which did not provide any data to support its criticism...."[72]

The SCO is critical of the entire proposal. In its letter dated August 4, 2006, the SCO comments that the County proposes to apply a methodology to all cities and counties, based on the results

[71] See Exhibit G, page 333 for City of Sacramento's Comments filed on August 4, 2006.

[72] See Exhibit J, pages 433-434, for City of Sacramento's Comments filed on September 22, 2006.

of an invalid time study it conducted for unit-level cases and its estimate of time spent for extended (Internal Affairs Bureau) cases.[73]

The SCO does not believe that LA County's proposed standard time of 12 hours for unit level cases is representative of costs incurred by all cities and counties in California. Furthermore, the time study was not consistent with SCO guidelines or the BSA's standards, as is indicated in the proposal. The time study results were based on only 18 unit-level cases, not the 44 cases selected in the time study plan. Of the 18 cases, only 14 involved POBOR-related activities. Furthermore, SCO believes that only 2.29 hours relate to reimbursable POBOR activities; the remaining hours relate to ineligible activities occurring prior to cases being assigned to a unit-level investigation and ineligible administrative investigative activities.

The SCO comments that in developing the standard time of 162 hours for extended cases and the $100/peace officer standard rate, LA County did not perform a time study; instead it estimated the investigators' time by applying a ratio of sworn-to-total cases (inclusive on non-sworn employees). The SCO believes that LA County's estimates are not supportable and include ineligible activities.

The DOF concurs with the SCO and also states that the uniform cost of $100 per peace officer is not based on specific activities or empirical data. DOF asserts that the standard hours and the uniform cost would likely result in payments for non-reimbursable activities.

In rebuttal comments, LA County disagrees with the SCO's belief that for unit cases, only 2.29 hours relate to reimbursable activities. LA County and the SCO disagree as to what activities are reimbursable under the existing parameters and guidelines. In LA County's time study of unit cases, the Sheriff's Department staff logged time spent on "investigations." The SCO maintains that this activity is not reimbursable and this time should not be included in any calculation of reimbursable costs and LA County maintains that it is reimbursable.

Analysis

Staff reviewed LA County's proposal and its underlying documentation and concludes that it is not a reasonable reimbursement methodology because it does not satisfy the conditions specified in Government Code section 17518.5. The statutory definition of reasonable reimbursement methodology requires that the proposed formula for reimbursing local agency and school district costs mandated by the state meets these conditions:

> (1) The total amount to be reimbursed statewide is equivalent to total estimated ... costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible ... claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

LA County's proposal is based on three formulas. The first formula consists of a standard time of 12 hours for unit level cases. The 12 hours/unit-level case is derived from LA County's time study which logged time spent on investigation. The SCO reviewed these time logs and concluded that the 12 hours included time spent on ineligible investigative activities. Moreover, in the analysis above of the SCO's proposed amendments to clarify reimbursable activities, staff

[73] See letter from the State Controller's Office, dated August 4, 2006.

concurs with the SCO, finding that costs for investigation are not reimbursable. Thus, staff finds that the total amount to be reimbursed statewide under this formula is *not* equivalent to total estimated costs to implement the mandate in a *cost-efficient* manner. Also, staff finds that there is no evidence in the record to determine if the proposed formula would meet the second condition. Therefore, staff concludes that the standard time for unit level cases does not meet the conditions for a reasonable reimbursement methodology.

As to the second formula of a standard time of 162 hours for extended cases, staff also finds that this formula does not satisfy the statutory conditions. First, the standard time of 162 hours per POBOR case is based on LA County's reimbursement claim. LA County claimed costs for review of the circumstances or documentation which led to initiating the POBOR case; conduct of a POBOR investigation including interrogating the officer and witnesses; preparation and review of the complaint or adverse comment for the officer's review and signature. Thus, staff finds that the second formula is also based on non-reimbursable costs. Therefore, staff finds that the total amount to be reimbursed statewide under this formula is not equivalent to total estimated costs to implement the mandate in a *cost-efficient* manner. As to the second condition, there is no evidence in the record to determine if the proposed formula would meet the second condition. Therefore, staff concludes that the standard time for extended level cases does not meet the conditions for a reasonable reimbursement methodology.

As to the third and final formula of a uniform cost allowance of $100 for each peace officer employed by the jurisdiction on January 1 of the claim year, staff finds that the formula does not satisfy the statutory conditions. Since this uniform rate is not based on any reimbursable activities, there is no way to show that it is equivalent to total estimated costs to implement the mandate in a cost-efficient manner, or to fully offset "projected costs to implement the mandate" in a cost-efficient manner. Therefore, staff concludes that the third formula does not meet the conditions for a reasonable reimbursement methodology.

Based on this review, staff concludes that LA County's proposal consisting of three formulas is not a reasonable reimbursement methodology because it does not satisfy conditions required under Government Code section 17518.5.

Issue 5: Is the Department of Finance proposal a reasonable reimbursement methodology, as defined in Government Code section 17518.5?

Background

The DOF requests that the parameters and guidelines be amended to include a reasonable reimbursement methodology. Under DOF's proposal, a distinct "base rate" would be calculated for each claimant based on SCO audited amounts for four years of claims. The annual reimbursement would be the result of multiplying the "base rate" by the number of covered officers. The base rates would be adjusted annually by an appropriate factor to capture the normal cost increases. A process for determining *mean* reimbursement rates would exist while final reimbursement rates are determined.

Comments

Comments were filed on this proposal by the City of Sacramento and the County of Los Angeles. The City of Sacramento commented on the impracticability of having the SCO audit all claimants, especially before the substantial differences in interpretation of the parameters and

guidelines are rectified. The County of Los Angeles believes that auditing all POBOR claims could take considerable time and would be a formidable and expensive task.

In rebuttal comments, DOF recognizes that its proposal would place increased workload on the SCO to audit POBOR claims, and believes the amount of time required is overstated by the City of Sacramento. DOF points out that the County of Sacramento noted that there are 58 counties and 478 cities in California; however, the Controller has only received claims from approximately 250 of these entities. Finance's proposal would require future claimants to be reimbursed at the average of the existing entity specific rates until sufficient claims are available to be audited by the Controller." DOF also states that if there is a new workload requirement for the Controller, the need for additional staff would be reviewed as part of the budget process and DOF would take into account the potential costs and savings.

Analysis

Staff reviewed the DOF proposal and concludes that it is not a reasonable reimbursement methodology because it does not satisfy the conditions specified in Government Code section 17518.5. The statutory definition of reasonable reimbursement methodology requires that the *proposed formula* for reimbursing local agency and school district costs mandated by the state meets these conditions:

> (1) The total amount to be reimbursed statewide is equivalent to total estimated ... costs to implement the mandate in a cost-efficient manner.
>
> (2) For 50 percent or more of eligible ... claimants, the amount reimbursed is estimated to fully offset their projected costs to implement the mandate in a cost-efficient manner.

The DOF proposes auditing all eligible claimants in order to propose individual base rates or mean reimbursement rates for a reasonable reimbursement methodology. Without a proposed formula (mean reimbursement rate), staff cannot determine if the statutory conditions for a reasonable reimbursement methodology, as defined in Government Code section 17518.5, can be met.

Therefore, staff concludes that DOF's proposal is not a reasonable reimbursement methodology as defined in Government Code section 17518.5.

Conclusion on Reasonable Reimbursement Methodology Proposals

Based on the evidence in the record, staff recommends denial of the proposed reasonable reimbursement methodologies.

CONCLUSION AND STAFF RECOMMENDATION

Staff recommends the Commission:

- adopt the proposed amendments to the parameters and guidelines for the Peace Officer Bill of Rights program, as modified by staff, beginning on page 49; and,
- authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

~~F/mandates/4499/adoptedPG~~
Adopted: July 27, 2000
Corrected: August 17, 2000
Proposed for Amendment: December 4, 2006

PROPOSED AMENDMENTS TO PARAMETERS AND GUIDELINES AS MODIFIED BY STAFF

Government Code Sections ~~3300 through 3310~~ 3301, 3303, 3304, 3305, 3306

As Added and Amended by Statutes of 1976, Chapter 465;
Statutes of 1978, Chapters 775, 1173, 1174, and 1178;
Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675

Peace Officers Procedural Bill of Rights
05-RL-4499-01(4499)
05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22

BEGINNING IN FISCAL YEAR 2006-2007

I. SUMMARY AND SOURCE OF THE MANDATE

In order to ensure stable employer-employee relations and effective law enforcement services, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights (POBOR).

The test claim legislation provides procedural protections to peace officers employed by local agencies and school districts[1] when a peace officer is subject to an interrogation by the employer, is facing punitive action or receives an adverse comment in his or her personnel file. ~~The protections required by the test claim legislation apply to peace officers classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees), and peace officers on probation who have not reached permanent status.~~

~~On November 30, 1999, the Commission adopted its Statement of Decision that the test claim legislation constitutes a partial reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514.~~

In 1999, the Commission approved the test claim and adopted the original Statement of Decision. The Commission found that certain procedural requirements under POBOR were rights already provided to public employees under the due process clause of the United States and California Constitutions. Thus, the Commission denied the procedural requirements of POBOR that were already required by law on the ground that they did not impose a new program or higher level of service, or impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c). Government Code section 17556, subdivision (c), generally provides that the Commission shall not find costs

[1] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

mandated by the state for test claim statutes that implement a federal law, unless the test claim statute mandates costs that exceed the federal mandate. The Commission approved the activities required by POBOR that exceeded the requirements of existing state and federal law.

On July 27, 2000, the Commission adopted parameters and guidelines that authorized reimbursement, beginning July 1, 1994, to counties, cities, a city and county, school districts, and special districts that employ peace officers for the ongoing activities summarized below:

- Developing or updating policies and procedures.
- Training for human resources, law enforcement, and legal counsel.
- Updating the status of cases.
- Providing the opportunity for an administrative appeal for permanent, at-will, and probationary employees that were subject to certain disciplinary actions that were not covered by the due process clause of state and federal law.
- When a peace officer is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the employer that could lead to certain disciplinary actions, the following costs and activities are eligible for reimbursement: compensation to the peace officer for interrogations occurring during off-duty time; providing prior notice to the peace officer regarding the nature of the interrogation and identification of investigating officers; tape recording the interrogation; providing the peace officer employee with access to the tape prior to any further interrogation at a subsequent time or if any further specified proceedings are contemplated; and producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of complaints of reports or complaints made by investigators.
- Performing certain activities, specified by the type of local agency or school district, upon the receipt of an adverse comment against a peace officer employee.

A technical correction was made to the parameters and guidelines on August 17, 2000.

In 2005, Statutes 2005, chapter 72, section 6 (AB 138) added section 3313 to the Government Code to direct the Commission to "review" the Statement of Decision, adopted in 1999, on the *Peace Officer Procedural Bill of Rights* test claim (commonly abbreviated as "POBOR") to clarify whether the subject legislation imposed a mandate consistent with California Supreme Court Decision in *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable court decisions.

On April 26, 2006, the Commission reviewed its original findings and adopted a Statement of Decision on reconsideration (05-RL-4499-01). The Statement of Decision on reconsideration became final on May 1, 2006. On review of the claim, the Commission found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision, which found that the test claim legislation constitutes a state-mandated program within the meaning of article XIII B, section 6 of the California Constitution for counties, cities, school districts, and special districts identified in Government Code section 3301 that employ peace officers.

The Commission further found that the *San Diego Unified School Dist.* case supports the Commission's 1999 Statement of Decision that the test claim legislation constitutes a partial reimbursable state-mandated program within the meaning of article XIII B,

section 6 of the California Constitution and Government Code section 17514 for all activities previously approved by the Commission except the following:

- The activity of providing the opportunity for an administrative appeal to probationary and at-will peace officers (except when the chief of police is removed) pursuant to Government Code section 3304 is no longer a reimbursable state-mandated activity because the Legislature amended Government Code section 3304 in 1998. The amendment limited the right to an administrative appeal to only those peace officers "who successfully completed the probationary period that may be required" by the employing agency and to situations where the chief of police is removed. (Stats. 1998, ch. 786, § 1.)
- The activities of obtaining the signature of the peace officer on the adverse comment or noting the officer's refusal to sign the adverse comment, pursuant to Government Code sections 3305 and 3306, when the adverse comment results in a punitive action protected by the due process clause[2] does not constitute a new program or higher level of service and does not impose costs mandated by the state pursuant to Government Code section 17556, subdivision (c).

The Statement of Decision adopted by the Commission on this reconsideration applies to costs incurred and claimed for the 2006-2007 fiscal year.

II. ELIGIBLE CLAIMANTS

Counties, cities, a city and county, school districts and special districts that employ peace officers are eligible claimants.

III. PERIOD OF REIMBURSEMENT

The period of reimbursement for the activities in this parameters and guidelines amendment begin on July 1, 2006.

Pursuant to Government Code section 17560, reimbursement for state-mandated costs may be claimed as follows:

1. A local agency or school district may file an estimated reimbursement claim by January 15 of the fiscal year in which costs are to be incurred, and, by January 15 following that fiscal year shall file an annual reimbursement claim that details the costs actually incurred for that fiscal year; or it may comply with the provisions of subdivision (b).
2. A local agency or school district may, by January 15 following the fiscal year in which costs are incurred, file an annual reimbursement claim that details the costs actually incurred for that fiscal year.
3. In the event revised claiming instructions are issued by the Controller pursuant to subdivision (c) of section 17558 between October 15 and January 15, a local agency or school district filing an annual reimbursement claim shall have 120 days following the issuance date of the revised claiming instructions to file a claim.

[2] Due process attaches when a permanent employee is dismissed, demoted, suspended, receives a reduction in salary, or receives a written reprimand. Due process also attaches when the charges supporting a dismissal of a probationary or at-will employee constitute moral turpitude that harms the employee's reputation and ability to find future employment and, thus, a name-clearing hearing is required.

~~At the time this test claim was filed, Section 17557 of the Government Code stated that a test claim must be submitted on or before December 31 following a given fiscal year to establish eligibility for reimbursement for that fiscal year. On December 21, 1995, the City of Sacramento filed the test claim for this mandate. Therefore, costs incurred for Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675 are eligible for reimbursement on or after July 1, 1994.~~

Reimbursable a~~A~~ctual costs for one fiscal year shall be included in each claim. Estimated costs for the subsequent year may be included on the same claim, if applicable. Pursuant to section 17561, subdivision (d)(1) of the Government Code, all claims for reimbursement of initial years' costs shall be submitted within 120 days of notification by the State Controller of the issuance of claiming instructions.

If total costs for a given year do not exceed $1,000 ~~200~~, no reimbursement shall be allowed, except as otherwise allowed by Government Code section 17564.

There shall be no reimbursement for any period in which the Legislature has suspended the operation of a mandate pursuant to state law.

IV. REIMBURSABLE ACTIVITIES

To be eligible for mandated cost reimbursement for any fiscal year, only actual costs may be claimed. Actual costs are those costs actually incurred to implement the mandated activities. Actual costs must be traceable and supported by source documents that show the validity of such costs, when they were incurred, and their relationship to the reimbursable activities. A source document is a document created at or near the same time the actual cost was incurred for the event or activity in question. Source documents may include, but are not limited to, employee time records or time logs, sign-in sheets, invoices, and receipts.

Evidence corroborating the source documents may include, but is not limited to, worksheets, cost allocation reports (system generated), purchase orders, contracts, agendas, training packets, and declarations. Declarations must include a certification or declaration stating, "I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct," and must further comply with the requirements of Code of Civil Procedure section 2015.5. Evidence corroborating the source documents may include data relevant to the reimbursable activities otherwise in compliance with local, state, and federal government requirements. However, corroborating documents cannot be substituted for source documents.

Claimants may use time studies to support salary and benefit costs when an activity is task-repetitive. Time study usage is subject to the review and audit conducted by the State Controller's Office.

The claimant is only allowed to claim and be reimbursed for increased costs for reimbursable activities identified below. Increased cost is limited to the cost of an activity that the claimant is required to incur as a result of the mandate.

For each eligible claimant, the following activities are reimbursable:

~~For each eligible claimant, all direct and indirect costs of labor, supplies and services, training and travel for the performance of the following activities, are eligible for reimbursement:~~

A. Administrative Activities (On-going Activities)

1. Developing or updating internal policies, procedures, manuals and other materials pertaining to the conduct of the mandated activities.

2. Attendance at specific training for human resources, law enforcement and legal counsel regarding the requirements of the mandate. The training must relate to mandate-reimbursable activities.

3. Updating the status report of ~~the~~ mandate-reimbursable POBOR ~~cases~~ activities. "Updating the status report of mandate-reimbursable POBOR ~~cases~~ activities" means tracking the procedural status of ~~cases~~ the mandate-reimbursable activities only. Reimbursement is not required to maintain or update the cases, set up the cases, review the cases, evaluate the cases, or close the cases.

B. Administrative Appeal

1. ~~Reimbursement period of July 1, 1994 through December 31, 1998.~~ The administrative appeal activities listed below apply to permanent peace officer employees~~, at-will employees, and probationary employees.~~ as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5. The administrative appeal activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, and school security officers.[3]

The following activities and costs are reimbursable:

a. Providing the opportunity for, and the conduct of an administrative appeal hearing for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):

- ~~Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest are not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);~~
- Transfer of permanent~~, probationary and at-will~~ employees for purposes of punishment;
- Denial of promotion for permanent~~, probationary and at-will~~ employees for reasons other than merit; and
- Other actions against permanent~~, probationary and at-will~~ employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

b. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

c. Legal review and assistance with the conduct of the administrative appeal hearing.

d. Preparation and service of subpoenas.

e. Preparation and service of any rulings or orders of the administrative body.

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[3] *Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.

f. The cost of witness fees.

g. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.

~~Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.~~

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the peace officer.

d. Litigating the final administrative decision.

2. ~~Reimbursement period beginning January 1, 1999 – The administrative appeal activities listed below apply to permanent employees and the Chief of Police.~~

Providing the opportunity for, and the conduct of an administrative appeal ~~for the following disciplinary actions~~ hearing for removal of the chief of police under circumstances that do not create a liberty interest (i.e., the charges do not constitute moral turpitude, which harms the employee's reputation and ability to find future employment.) (Gov. Code, § 3304, subd. (b).)~~:~~

- ~~Dismissal, demotion, suspension, salary reduction or written reprimand received by the Chief of Police whose liberty interest is not affected (i.e.: the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);~~
- ~~Transfer of permanent employees for purposes of punishment;~~
- ~~Denial of promotion for permanent employees for reasons other than merit; and~~
- ~~Other actions against permanent employees or the Chief of Police that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee~~.

~~Included in the foregoing are the preparation and review of the various documents to commence and proceed with the administrative hearing; legal review and assistance with the conduct of the administrative hearing; preparation and service of subpoenas, witness fees, and salaries of employee witnesses, including overtime; the time and labor of the administrative body and its attendant clerical services; the preparation and service of any rulings or orders of the administrative body.~~

The following activities and costs are reimbursable:

a. Preparation and review of the various documents necessary to commence and proceed with the administrative appeal hearing.

b. Legal review and assistance with the conduct of the administrative appeal hearing.

c. Preparation and service of subpoenas.

d. Preparation and service of any rulings or orders of the administrative body.

e. The cost of witness fees.

f. The cost of salaries of employee witnesses, including overtime, the time and labor of the administrative appeal hearing body and its attendant clerical services.

The following activities are **not** reimbursable:

a. Investigating charges.

b. Writing and reviewing charges.

c. Imposing disciplinary or punitive action against the chief of police.

d. Litigating the final administrative decision.

C. Interrogations

~~Claimants are eligible for reimbursement for t~~The performance of the activities listed in this section are eligible for reimbursement only when a peace officer, as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5, is under investigation, or becomes a witness to an incident under investigation, and is subjected to an interrogation by the commanding officer, or any other member of the employing public safety department, that could lead to dismissal, demotion, suspension, reduction in salary, written reprimand, or transfer for purposes of punishment. (Gov. Code, § 3303.)[4]

Claimants are not eligible for reimbursement for the activities listed in this section when an interrogation of a peace officer is in the normal course of duty, counseling, instruction, or informal verbal admonishment by, or other routine or unplanned contact with, a supervisor or any other public safety officer. Claimants are also not eligible for reimbursement when the investigation is concerned solely and directly with alleged criminal activities. (Gov. Code, § 3303, subd. (i).)

The following activities are reimbursable:

1. When required by the seriousness of the investigation, compensating the peace officer for interrogations occurring during off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)

   ~~Included in the foregoing is the~~ pPreparation and review of overtime compensation requests are reimbursable.

2. Providing ~~prior~~ notice to the peace officer before the interrogation ~~regarding the nature of the interrogation and identification of the investigating officers~~. The notice shall inform the peace officer of the rank, name, and command of the officer in charge of the interrogation, the interrogating officers, and all other persons to be

[4] Interrogations of reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, and school security officers are not reimbursable. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

present during the interrogation. The notice shall inform the peace officer of the nature of the investigation. (Gov. Code, § 3303, subds. (b) and (c).)

~~Included in the foregoing is the review of agency complaints or other documents to prepare the notice of interrogation; determination of the investigating officers; redaction of the agency complaint for names of the complainant or other accused parties or witnesses or confidential information; preparation of notice or agency complaint; review by counsel; and presentation of notice or agency complaint to peace officer.~~

The following activities relating to the notice of interrogation are reimbursable:

a. Review of agency complaints or other documents to prepare the notice of interrogation.

b. Identification of the interrogating officers to include in the notice of interrogation.

d. Preparation of the notice.

e. Review of notice by counsel.

f. Providing notice to the peace officer prior to interrogation.

3. ~~Tape r~~Recording the interrogation when the peace officer employee records the interrogation. (Gov. Code, § 3303, subd. (g).)

~~Included in the foregoing is the~~ The cost of ~~tape~~ media and storage, and the cost of transcription are reimbursable. The investigator's time to record the session and transcription costs of non-sworn and peace officers are **not** reimbursable.

4. Providing the peace officer employee with access to the ~~tape~~ recording prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):

a. The further proceeding is not a disciplinary action;

b. The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest is not affected (i.e., the charges supporting the dismissal does not harm the employee's reputation or ability to find future employment);

c. The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

d. The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

e. The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

~~Included in the foregoing is the~~ The cost of ~~tape~~ media copying is reimbursable.

5. Producing transcribed copies of any notes made by a stenographer at an interrogation, and copies of reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer, in the following circumstances (Gov. Code, § 3303, subd. (g)):

a) When the investigation does not result in disciplinary action; and

b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

~~Included in the foregoing is the r~~ Review of the complaints, notes or ~~tape~~ recordings for issues of confidentiality by law enforcement, human relations or counsel; and the cost of processing, service and retention of copies are reimbursable.

The following activities are **not** reimbursable:

1. Activities occurring before the assignment of the case to an administrative investigator. These activities include taking an initial complaint, setting up the complaint file, interviewing parties, reviewing the file, and determining whether the complaint warrants an administrative investigation.
2. Investigation activities, including assigning an investigator to the case, reviewing the allegation, communicating with other departments, visiting the scene of the alleged incident, gathering evidence, identifying and contacting complainants and witnesses.
3. Preparing for the interrogation, reviewing and preparing interrogation questions, conducting the interrogation, and reviewing the responses given by the officer and/or witness during the interrogation.
4. Closing the file, including the preparation of a case summary disposition reports and attending executive review or committee hearings related to the investigation.

D. Adverse Comment

Performing the following activities upon receipt of an adverse comment concerning a peace officer, as defined in Penal Code sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.4, and 830.5. (Gov. Code, §§ 3305 and 3306.):[5]

[5] The adverse comment activities do not apply to reserve or recruit officers; coroners; railroad police officers commissioned by the Governor; or non-sworn officers including custodial officers, sheriff security officers, police security officers, or school security officers. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 569; Government Code section 3301; Penal Code sections 831, 831.4.)

School Districts

~~(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:~~

- ~~Obtaining the signature of the peace officer on the adverse comment; or~~
- ~~Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.~~

(a) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

1. Providing notice of the adverse comment;
2. Providing an opportunity to review and sign the adverse comment;
3. Providing an opportunity to respond to the adverse comment within 30 days; and
4. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

1. Obtaining the signature of the peace officer on the adverse comment; or
2. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

Counties

~~(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:~~

- ~~Obtaining the signature of the peace officer on the adverse comment; or~~
- ~~Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.~~

(a) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

1. Providing notice of the adverse comment;
2. Providing an opportunity to review and sign the adverse comment;
3. Providing an opportunity to respond to the adverse comment within 30 days; and
4. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties obtained are entitled to reimbursement for:

1. Providing notice of the adverse comment: and
2. Obtaining the signature of the peace officer on the adverse comment; or
3. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

~~(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:~~

- ~~Obtaining the signature of the peace officer on the adverse comment; or~~
- ~~Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.~~

(a) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

1. Providing notice of the adverse comment;
2. Providing an opportunity to review and sign the adverse comment;
3. Providing an opportunity to respond to the adverse comment within 30 days; and
4. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

1. Providing notice of the adverse comment;
2. Providing an opportunity to respond to the adverse comment within 30 days; and
3. Obtaining the signature of the peace officer on the adverse comment; or
4. Noting the peace officer's refusal to sign the adverse comment ~~on the document~~ and obtaining the signature or initials of the peace officer under such circumstances.

~~Included in the foregoing are review of circumstances or documentation leading to adverse comment by supervisor, command staff, human resources staff or counsel, including determination of whether same constitutes an adverse comment; preparation of comment and review for accuracy; notification and presentation of adverse comment to officer and notification concerning rights regarding same; review of response to adverse comment, attaching same to adverse comment and filing.~~

The following adverse comment activities are reimbursable:

1. Review of the circumstances or documentation leading to the adverse comment by supervisor, command staff, human resources staff, or counsel to determine whether the comment constitutes a written reprimand or an adverse comment.
2. Preparation of notice of adverse comment.
3. Review of notice of adverse comment for accuracy.
4. Informing the peace officer about the officer's rights regarding the notice of adverse comment.
5. Review of peace officer's response to adverse comment.
6. Attaching the peace officers' response to the adverse comment and filing the document in the appropriate file.

The following activities are **not** reimbursable:

1. Investigating a complaint.
2. Interviewing a complainant.
3. Preparing a complaint investigation report.

V. CLAIM PREPARATION AND SUBMISSION

Each of the following cost elements must be identified for each reimbursable activity identified in Section IV, Reimbursable Activities, of this document. Each claimed reimbursable cost must be supported by source documentation as described in Section IV. Additionally, each reimbursement claim must be filed in a timely manner.

A. Direct Cost Reporting

Direct costs are those costs incurred specifically for the reimbursable activities. The following direct costs are eligible for reimbursement.

1. Salaries and Benefits

Report each employee implementing the reimbursable activities by name, job classification, and productive hourly rate (total wages and related benefits divided by productive hours). Describe the specific reimbursable activities performed and the hours devoted to each reimbursable activity performed.

2. Materials and Supplies

Report the cost of materials and supplies that have been consumed or expended for the purpose of the reimbursable activities. Purchases shall be claimed at the actual price after deducting discounts, rebates, and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged on an appropriate and recognized method of costing, consistently applied.

3. Contracted Services

Report the name of the contractor and services performed to implement the reimbursable activities. If the contractor bills for time and materials, report the number of hours spent on the activities and all costs charged. If the contract is a fixed price, report the services that were performed during the period covered by the reimbursement claim. If the contract services are also used for purposes other than the reimbursable activities, only the pro-rata portion of the services used to implement the reimbursable activities can be claimed. Submit contract consultant

and attorney invoices with the claim and a description of the contract scope of services.

4. Fixed Assets and Equipment

Report the purchase price paid for fixed assets and equipment (including computers) necessary to implement the reimbursable activities. The purchase price includes taxes, delivery costs, and installation costs. If the fixed asset or equipment is also used for purposes other than the reimbursable activities, only the pro-rata portion of the purchase price used to implement the reimbursable activities can be claimed.

5. Travel

Report the name of the employee traveling for the purpose of the reimbursable activities. Include the date of travel, destination point, the specific reimbursable activity requiring travel, and related travel expenses reimbursed to the employee in compliance with the rules of the local jurisdiction. Report employee travel time according to the rules of cost element A.1, Salaries and Benefits, for each applicable reimbursable activity.

6. Training

Report the cost of training an employee to perform the reimbursable activities, as specified in Section IV of this document. Report the name and job classification of each employee preparing for, attending, and/or conducting training necessary to implement the reimbursable activities. Provide the title, subject, and purpose (related to the mandate of the training session), dates attended, and location. If the training encompasses subjects broader than the reimbursable activities, only the pro-rata portion can be claimed. Report employee training time for each applicable reimbursable activity according to the rules of cost element A.1, Salaries and Benefits, and A.2, Materials and Supplies. Report the cost of consultants who conduct the training according to the rules of cost element A.3, Contracted Services.

B. Indirect Cost Rates

1. Local Agencies

Indirect costs are costs that are incurred for a common or joint purpose, benefiting more than one program, and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of the central government services distributed to the other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the Office of Management and Budget (OMB) Circular A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) if the indirect cost rate claimed exceeds 10%.

If the claimant chooses to prepare an ICRP, both the direct costs (as defined and described in OMB Circular A-87 Attachments A and B) and the indirect costs shall exclude capital expenditures and unallowable costs (as defined and described in OMB Circular A-87 Attachments A and B). However, unallowable costs must be included in the direct costs if they represent activities to which indirect costs are properly allocable.

The distribution base may be (1) total direct costs (excluding capital expenditures and other distorting items, such as pass-through funds, major subcontracts, etc.), (2) direct salaries and wages, or (3) another base which results in an equitable distribution.

In calculating an ICRP, the claimant shall have the choice of one of the following methodologies:

1. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) classifying a department's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate which is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected; or

2. The allocation of allowable indirect costs (as defined and described in OMB Circular A-87 Attachments A and B) shall be accomplished by (1) separating a department into groups, such as divisions or sections, and then classifying the division's or section's total costs for the base period as either direct or indirect, and (2) dividing the total allowable indirect costs (net of applicable credits) by an equitable distribution base. The result of this process is an indirect cost rate that is used to distribute indirect costs to mandates. The rate should be expressed as a percentage which the total amount allowable indirect costs bears to the base selected.

2. School Districts

Indirect costs are costs that have been incurred for common or joint purposes. These costs benefit more than one cost objective and cannot be readily identified with a particular final cost objective without effort disproportionate to the results achieved. After direct costs have been determined and assigned to other activities, as appropriate, indirect costs are those remaining to be allocated to benefited cost objectives. A cost may not be allocated as an indirect cost if any other cost incurred for the same purpose, in like circumstances, has been claimed as a direct cost.

Indirect costs include: (a) the indirect costs originating in each department or agency of the governmental unit carrying out state mandated programs, and (b) the costs of central governmental services distributed through the central service cost allocation plan and not otherwise treated as direct costs.

School districts must use the J-380 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

3. County Offices of Education

County offices of education must use the J-580 (or subsequent replacement) non-restrictive indirect cost rate provisionally approved by the California Department of Education.

4. Community College Districts

Community colleges have the option of using: (1) a federally approved rate, utilizing the cost accounting principles from the Office of Management and Budget Circular A-21, "Cost Principles of Educational Institutions"; (2) the rate calculated on State Controller's Form FAM-29C; or (3) a 7% indirect cost rate.

VI. RECORD RETENTION

Pursuant to Government Code section 17558.5, subdivision (a), a reimbursement claim for actual costs filed by a local agency or school district pursuant to this chapter[6] is subject to the initiation of an audit by the Controller no later than three years after the date that the actual reimbursement claim is filed or last amended, whichever is later. However, if no funds are appropriated or no payment is made to a claimant for the program for the fiscal year for which the claim is filed, the time for the Controller to initiate an audit shall commence to run from the date of initial payment of the claim. In any case, an audit shall be completed not later than two years after the date that the audit is commenced. All documents used to support the reimbursable activities, as described in Section IV, must be retained during the period subject to audit. If an audit has been initiated by the Controller during the period subject to audit, the retention period is extended until the ultimate resolution of any audit findings.

VII. OFFSETTING ~~SAVINGS~~ REVENUES AND OTHER REIMBURSEMENTS

Any offsetsting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

VIII. STATE CONTROLLER'S REVISED CLAIMING INSTRUCTIONS

Pursuant to Government Code section 17558, subdivision (c), the Controller shall issue revised claiming instructions for each mandate that requires state reimbursement not later than 60 days after receiving the revised parameters and guidelines from the Commission, to assist local agencies and school districts in claiming costs to be reimbursed. The revised claiming instructions shall be derived from the test claim decision and the revised parameters and guidelines adopted by the Commission.

Pursuant to Government Code section 17561, subdivision (d)(2), issuance of the revised claiming instructions shall constitute a notice of the right of the local agencies and school districts to file reimbursement claims, based upon the revised parameters and guidelines adopted by the Commission.

IX. REMEDIES BEFORE THE COMMISSION

Upon request of a local agency or school district, the Commission shall review the claiming instructions issued by the State Controller or any other authorized state agency for reimbursement of mandated costs pursuant to Government Code section 17571. If the Commission determines that the claiming instructions do not conform to the parameters and guidelines, the Commission shall direct the Controller to modify the claiming instructions and the Controller shall modify the claiming instructions to conform to the parameters and guidelines as directed by the Commission.
In addition, requests may be made to amend parameters and guidelines pursuant to Government Code section 17557, subdivision (d), and California Code of Regulations, title 2, section 1183.2.

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[6] This refers to Title 2, division 4, part 7, chapter 4 of the Government Code.

X. LEGAL AND FACTUAL BASIS FOR THE PARAMETERS AND GUIDELINES

The Statement of Decision (CSM 4499) and the Statement of Decision on Reconsideration (05-RL-4499-01) are legally binding on all parties and provide the legal and factual basis for the parameters and guidelines. The support for the legal and factual findings is found in the administrative record for the test claim. The administrative record, including the Statement of Decision and the Statement of Decision on Reconsideration, is on file with the Commission.

~~Claims for reimbursement must be timely filed and identify each cost element for which reimbursement is claimed under this mandate. Claimed costs must be identified to each reimbursable activity identified in Section IV. of this document.~~

~~SUPPORTING DOCUMENTATION~~

~~Claimed costs shall be supported by the following cost element information:~~

~~A. Direct Costs~~

~~Direct Costs are defined as costs that can be traced to specific goods, services, units, programs, activities or functions.~~

~~Claimed costs shall be supported by the following cost element information:~~

~~1. Salaries and Benefits~~

~~Identify the employee(s), and/or show the classification of the employee(s) involved. Describe the reimbursable activities performed and specify the actual time devoted to each reimbursable activity by each employee, the productive hourly rate, and related employee benefits.~~

~~Reimbursement includes compensation paid for salaries, wages, and employee benefits. Employee benefits include regular compensation paid to an employee during periods of authorized absences (e.g., annual leave, sick leave) and the employer's contributions to social security, pension plans, insurance, and worker's compensation insurance. Employee benefits are eligible for reimbursement when distributed equitably to all job activities performed by the employee.~~

~~2. Materials and Supplies~~

~~Only expenditures that can be identified as a direct cost of this mandate may be claimed. List the cost of the materials and supplies consumed specifically for the purposes of this mandate. Purchases shall be claimed at the actual price after deducting cash discounts, rebates and allowances received by the claimant. Supplies that are withdrawn from inventory shall be charged based on a recognized method of costing, consistently applied.~~

~~3. Contract Services~~

~~Provide the name(s) of the contractor(s) who performed the services, including any fixed contracts for services. Describe the reimbursable activity(ies) performed by each named contractor and give the number of actual hours spent on the activities, if applicable. Show the inclusive dates when services were performed and itemize all costs for those services. Submit contract consultant and attorney invoices with the claim.~~

~~4. Travel~~

Travel expenses for mileage, per diem, lodging, and other employee entitlements are eligible for reimbursement in accordance with the rules of the local jurisdiction. Provide the name(s) of the traveler(s), purpose of travel, inclusive dates and times of travel, destination points, and travel costs.

5. Training

The cost of training an employee to perform the mandated activities is eligible for reimbursement. Identify the employee(s) by name and job classification. Provide the title and subject of the training session, the date(s) attended, and the location. Reimbursable costs may include salaries and benefits, registration fees, transportation, lodging, and per diem.

B. Indirect Costs

Indirect costs are defined as costs which are incurred for a common or joint purpose, benefiting more than one program and are not directly assignable to a particular department or program without efforts disproportionate to the result achieved. Indirect costs may include both (1) overhead costs of the unit performing the mandate; and (2) the costs of central government services distributed to other departments based on a systematic and rational basis through a cost allocation plan.

Compensation for indirect costs is eligible for reimbursement utilizing the procedure provided in the OMB A-87. Claimants have the option of using 10% of direct labor, excluding fringe benefits, or preparing an Indirect Cost Rate Proposal (ICRP) for the department if the indirect cost rate claimed exceeds 10%. If more than one department is claiming indirect costs for the mandated program, each department must have its own ICRP prepared in accordance with OMB A-87. An ICRP must be submitted with the claim when the indirect cost rate exceeds 10%.

VI. SUPPORTING DATA

For audit purposes, all costs claimed shall be traceable to source documents (e.g., employee time records, invoices, receipts, purchase orders, contracts, worksheets, calendars, declarations, etc.) that show evidence of the validity of such costs and their relationship to the state mandated program. All documentation in support of the claimed costs shall be made available to the State Controller's Office, as may be requested, and all reimbursement claims are subject to audit during the period specified in Government Code section 17558.5, subdivision (a).

All claims shall identify the number of cases in process at the beginning of the fiscal year, the number of new cases added during the fiscal year, the number of cases completed or closed during the fiscal year, and the number of cases in process at the end of the fiscal year.

VII. OFFSETTING SAVINGS AND OTHER REIMBURSEMENT

Any offsetting savings the claimant experiences as a direct result of the subject mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds shall be identified and deducted from this claim.

~~VIII. STATE CONTROLLER'S OFFICE REQUIRED CERTIFICATION~~

~~An authorized representative of the claimant shall be required to provide a certification of the claim, as specified in the State Controller's claiming instructions, for those costs mandated by the State contained herein.~~

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM: Government Code Sections 3300 through 3310, As Added and Amended by Statutes of 1976, Chapter 465; Statutes of 1978, Chapters 775, 1173, 1174, and 1178; Statutes of 1979, Chapter 405; Statutes of 1980, Chapter 1367; Statutes of 1982, Chapter 994; Statutes of 1983, Chapter 964; Statutes of 1989, Chapter 1165; and Statutes of 1990, Chapter 675; and Filed on December 21, 1995; By the City of Sacramento, Claimant.	NO. CSM 4499 *Peace Officers Procedural Bill of Rights* STATEMENT OF DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; TITLE 2, CALIFORNIA CODE OF REGULATIONS, DIVISION 2, CHAPTER 2.5, ARTICLE 7 *(Adopted November 30, 1999)*

STATEMENT OF DECISION

On August 26, 1999 the Commission on State Mandates (Commission) heard this test claim during a regularly scheduled hearing. Ms. Pamela A. Stone appeared for the City of Sacramento. Mr. Allan Burdick appeared for the League of California Cities/SB 90 Service. Ms. Elizabeth Stein appeared for the California State Personnel Board. Mr. James Apps and Mr. Joseph Shinstock appeared for the Department of Finance. The following persons were witnesses for the City of Sacramento: Ms. Dee Contreras, Director of Labor Relations, and Mr. Edward J. Takach, Labor Relations Officer.

At the hearing, oral and documentary evidence was introduced, the test claim was submitted, and the vote was taken.

The law applicable to the Commission's determination of a reimbursable state mandated program is Government Code section 17500 et seq. and section 6, article XIII B of the California Constitution and related case law.

The Commission, by a vote of 5 to 1, approved this test claim.

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BACKGROUND

In 1976, the Legislature enacted Government Code sections 3300 through 3310, known as the Peace Officers Procedural Bill of Rights Act. The test claim legislation provides a series of rights and procedural safeguards to peace officers employed by local agencies and school districts that are subject to investigation or discipline. Legislative intent is expressly provided in Government Code section 3301 as follows:

> "The Legislature hereby finds and declares that the rights and protections provided to peace officers under this chapter constitute a matter of statewide concern. The Legislature further finds and declares that effective law enforcement depends upon the maintenance of stable employer-employee relations, between public safety employees and their employers. In order to assure that stable relations are continued throughout the state and to further assure that effective services are provided to all people of the state, it is necessary that this chapter be applicable to all public safety officers, as defined in this section, within the State of California."

The test claim legislation applies to all employees classified as "peace officers" under specified provisions of the Penal Code, including those peace officers employed by counties, cities, special districts and school districts.[1] The test claim legislation also applies to peace officers that are classified as permanent employees, peace officers who serve at the pleasure of the agency and are terminable without cause ("at-will" employees)[2] and peace officers on probation who have not reached permanent status.[3]

COMMISSION FINDINGS

Issue: Does the test claim legislation, which establishes rights and procedures for peace officers subject to investigation or discipline, constitute a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution and Government Code section 17514[4]?

For a statute to impose a reimbursable state mandated program, the statutory language must direct or obligate an activity or task upon local governmental agencies. In addition, the required

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[1] Government Code section 3301 states: "For purposes of this chapter, the term public safety officer means all peace officers specified in Sections 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, except subdivision (e), 830.34, 830.35, except subdivision (c), 830.36, 830.37, 830.38, 830.4, and 830.5 of the Penal Code."

[2] *Gray* v. *City of Gustine* (1990) 224 Cal.App.3d 621; *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795.

[3] *Bell* v. *Duffy* (1980) 111 Cal.App.3d 643; *Barnes* v. *Personnel Department of the City of El Cajon* (1978) 87 Cal.App.3d 502.

[4] Government Code section 17514 defines "costs mandated by the state" as follows: "'Costs mandated by the state' means any increased costs which a local agency or school district is required to incur after July 1, 1980, as a result of any statute enacted on or after January 1, 1975, or any executive order implementing any statute enacted on or after January 1, 1975, which mandates a new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution."

activity or task must be new, thus constituting a "new program", or create an increased or "higher level of service" over the former required level of service. The court has defined a "new program" or "higher level of service" as a program that carries out the governmental function of providing services to the public, or a law which, to implement a state policy, imposes unique requirements on local agencies and does not apply generally to all residents and entities in the state. To determine if a required activity is new or imposes a higher level of service, a comparison must be made between the test claim legislation and the legal requirements in effect immediately prior to the enactment of the test claim legislation. Finally, the newly required activity or increased level of service must be state mandated and impose "costs mandated by the state."[5]

The test claim legislation requires local agencies and school districts to take specified procedural steps when investigating or disciplining a peace officer employee. The stated purpose of the test claim legislation is to promote stable relations between peace officers and their employers and to ensure the effectiveness of law enforcement services. Based on the legislative intent, the Commission found that the test claim legislation carries out the governmental function of providing a service to the public. Moreover, the test claim legislation imposes unique requirements on local agencies and school districts that do not apply generally to all residents and entities of the state. Thus, the Commission determined that the test claim legislation constitutes a "program" within the meaning of article XIII B, section 6 of the California Constitution.

The Commission recognized, however, that several California courts have analyzed the test claim legislation and found a connection between its requirements and the requirements imposed by the due process clause of the United States and California Constitutions. For example, the court in *Riveros* v. *City of Los Angeles* analyzed the right to an administrative appeal under the test claim legislation for a probationary employee and noted that the right to such a hearing arises from the due process clause.

> "*The right to such a hearing arises from the due process protections of the Fourteenth Amendment to the United States Constitution.* . . . The limited purpose of the section 3304 appeal is to give the peace officer a chance to establish a formal record of the circumstances surrounding his termination and try to convince his employer to reverse its decision, either by showing that the charges are false or through proof of mitigating circumstances [citation omitted]. *This is very nearly the same purpose for the hearing mandated by due process requirements*, which must afford the officer a chance to refute the charges or clear his name." (Emphasis added.)[6]

Thus, the Commission continued its inquiry and compared the test claim legislation to the prior legal requirements imposed on public employers by the due process clause to determine if the activities defined in the test claim legislation are new or impose a higher level of service.

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[5] *County of Los Angeles* v. *State of California* (1987) 43 Cal.3d 46, 56; *Carmel Valley Fire Protection Dist.* v. *State of California* (1987) 190 Cal.App.3d 521, 537; *City of Sacramento* v. *State of California* (1990) 50 Cal.3d 51, 66; *Lucia Mar Unified School Dist.* v. *Honig* (1988) 44 Cal.3d 830, 835; Gov. Code, § 17514.

[6] *Riveros* v. *City of Los Angeles* (1996) 41 Cal.App.4th 1342, 1359.

The Commission also considered whether there are any "costs mandated by the state." Since the due process clause of the United States Constitution is a form of federal law, the Commission recognized that Government Code section 17556, subdivision (c), is triggered. Pursuant to Government Code section 17556, subdivision (c), there are *no* "costs mandated by the state" and no reimbursement is required if the test claim legislation "implemented a federal law resulting in costs mandated by the federal government, unless the [test claim legislation] mandates costs which exceed the mandate in that federal law or regulation."[7]

These issues are discussed below.

The Due Process Clause of the U.S. and California Constitutions

The due process clause of the United States and California Constitutions provide that the state shall not "deprive any person of life, liberty, or property without due process of law."[8] In the public employment arena, an employee's property and liberty interests are commonly at stake.

Property Interest in Employment

Property interests protected by the due process clause extend beyond actual ownership of real estate or money. The U.S. Supreme Court determined that a property interest deserving protection of the due process clause exists when an employee has a "legitimate claim" to continued employment.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . ."
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - -rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[9]

Applying the above principles, both the U.S. Supreme Court and California courts hold that "permanent" employees, who can only be dismissed or subjected to other disciplinary

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[7] Government Code section 17513 defines "costs mandated by the federal government" as follows:

> " 'Costs mandated by the federal government' means any increased costs incurred by a local agency or school district after January 1, 1973, in order to comply with the requirements of a federal statute or regulation. 'Costs mandated by the federal government' includes costs resulting from enactment of state law or regulation where failure to enact that law or regulation to meet specific federal program or service requirements would result in substantial monetary penalties or loss of funds to public or private persons in the state. 'Costs mandated by the federal government' does not include costs which are specifically reimbursed or funded by the federal or state government or programs or services which may be implemented at the option of the state, local agency, or school district."

[8] U.S. Constitution, 14th Amendment; California Constitution, Article 1, §§ 7 and 15.

[9] *Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.

measures for "cause", have a legitimate claim of entitlement to their job and thus, possess a property interest in continued employment.[10]

Moreover, California courts require employers to comply with due process when a permanent employee is dismissed[11], demoted[12], suspended[13], receives a reduction in salary[14] or receives a written reprimand.[15]

The Department of Finance and the State Personnel Board contended that due process property rights attach when an employee is transferred. They cited *Runyon* v. *Ellis* and an SPB Decision (*Ramallo* SPB Dec. No. 95-19) for support.

The Commission disagreed with the State's argument in this regard. First, in *Runyon* v. *Ellis*, the court found that the employee was entitled to an administrative hearing under the due process clause as a result of a transfer *and an accompanying reduction of pay*. The court did not address the situation where the employee receives a transfer alone.[16] In addition, in *Howell* v. *County of San Bernardino*, the court recognized that "[a]lthough a permanent employee's right to continued employment is generally regarded as fundamental and vested, an employee enjoys no such right to continuation in a particular job assignment."[17] Thus, the Commission found that local government employers are not required to provide due process protection in the case of a transfer.

Furthermore, although the SPB decision may apply to the State as an employer, the Commission found that that the SPB decision does not apply to actions taken by a local government employer.

Accordingly, the Commission found that an employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

When a property interest is affected and due process applies, the procedural safeguards required by the due process clause generally require notice to the employee and an opportunity to respond, with some variation as to the nature and timing of the procedural safeguards. In cases of dismissal, demotion, long-term suspension and reduction of pay, the California

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[10] *Slochower* v. *Board of Education* (1956) 350 U.S. 551, where the U.S. Supreme Court found that a tenured college professor dismissed from employment had a property interest in continued employment that was safeguarded by the due process clause; *Gilbert* v. *Homar* (1997) 520 U.S. 924, where the U.S. Supreme Court found that a police officer, employed as a permanent employee by a state university, had a property interest in continued employment and was afforded due process protections resulting from a suspension without pay; *Skelly* v. *State Personnel Board* (1975) 15 Cal.3d 194, where the California Supreme Court held a permanent civil service employee of the state has a property interest in continued employment and cannot be dismissed without due process of law.

[11] *Skelly, supra*, 15 Cal.3d 194.

[12] *Ng.* v. *State Personnel Board* (1977) 68 Cal.App.3d 600.

[13] *Civil Service Assn.* v. *City and County of San Francisco* (1978) 22 Cal.3d 552, 558-560.

[14] *Ng, supra*, 68 Cal.App.3d 600, 605.

[15] *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438.

[16] *Runyon* v. *Ellis* (1995) 40 Cal.App.4th 961.

[17] *Howell* v. *County of San Bernardino* (1983) 149 Cal.App.3d 200, 205.

Supreme Court in *Skelly* prescribed the following due process requirements *before* the discipline becomes effective:

- Notice of the proposed action;
- The reasons for the action;
- A copy of the charges and materials upon which the action is based; and
- The right to respond, either orally or in writing, to the authority initially imposing discipline.[18]

In cases of short-term suspensions (ten days or less), the employee's property interest is protected as long as the employee receives notice, reasons for the action, a copy of the charges, and the right to respond *either during the suspension, or within a reasonable time thereafter.*[19]

Similarly, the Commission found that in the case of a written reprimand where the employee is not deprived of pay or benefits, the employer is not required to provide the employee with the due process safeguards *before* the effective date of the written reprimand. Instead, the court in *Stanton* found that an appeals process provided to the employee *after* the issuance of the written reprimand satisfies the due process clause.[20]

The claimant disagreed with the Commission's interpretation of the *Stanton* case and its application to written reprimands.

The claimant contended *Stanton* stands for the proposition that the due process guarantees outlined in *Skelly* do not apply to a written reprimand. Thus, the claimant concluded that an employee is not entitled to any due process protection when the employee receives a written reprimand. The claimant cited the following language from *Stanton* in support of its position:

> ". . . As the City notes, no authority supports plaintiff's underlying assertion that issuance of a written reprimand triggers the due process safeguards outlined in *Skelly*. Courts have required adherence to *Skelly* in cases in which an employee is demoted [citations omitted]; suspended without pay [citations omitted]; or dismissed [citations omitted]. We find no authority mandating adherence to *Skelly* when a written reprimand is issued."
>
> "We see no justification for extending *Skelly* to situations involving written reprimands. Demotions, suspension and dismissal all involve depriving the public employee of pay or benefits; a written reprimand results in no such loss to the employee."

The facts in *Stanton* are as follows. A police officer received a written reprimand for discharging a weapon in violation of departmental rules. After he received the reprimand, he appealed to the police chief in accordance with the memorandum of understanding and the

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[18] *Skelly, supra*, 15 Cal.3d 194, 215.

[19] *Civil Service Assn., supra*, 22 Cal.3d 552, 564.

[20] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

police chief upheld the reprimand. The officer then filed a lawsuit contending that he was entitled to an administrative appeal. The court denied the plaintiff's request finding that that the meeting with the police chief satisfied the administrative appeals provision in the test claim legislation (Government Code section 3304), and thus, satisfied the employee's due process rights.

The Commission agreed that the court in *Stanton* held the rights outlined in *Skelly* do not apply when an employee receives a written reprimand. Thus, under *Skelly*, the rights to receive notice, the reasons for the reprimand, a copy of the charges and the right to respond are not required to be given to an employee *before* the reprimand takes effect.

However, the court found that the employee *is* guaranteed due process protection upon receipt of a written reprimand. The court found that when the appeals process takes places *after* the reprimand, due process is satisfied. The court in *Stanton* also states the following:

> "Moreover, Government Code section 3303 et seq., the Public Safety Officer Procedural Bill of Rights Act, provides police officers who are disciplined by their departments with procedural safeguards. Section 3304, subdivision (b) states no punitive action may be taken by a public agency against a public safety officer without providing the officer with an opportunity for administrative appeal. Punitive action includes written reprimands. [Citation omitted.] Even without the protection afforded by Skelly, plaintiff's *procedural due process rights*, following a written reprimand, *are protected* by the appeals process mandated by Government Code section 3304, subdivision (b)." (Emphasis added.)[21]

Accordingly, the Commission found that the due process clause of the United States and California Constitutions apply when a permanent employee is

- Dismissed;
- Demoted;
- Suspended;
- Receives a reduction in salary; and
- Receives a written reprimand.

Liberty Interest

Although probationary and at-will employees, who can be dismissed without cause, do not have a property interest in their employment, the employee may have a liberty interest affected by a dismissal when the charges supporting the dismissal damage the employee's reputation and impair the employee's ability to find other employment. The courts have defined the liberty interest as follows:

> "[A]n employee's liberty is impaired if the government, in connection with an employee's dismissal or failure to be rehired, makes a 'charge

[21] *Stanton, supra* ,226 Cal.App.3d 1438, 1442.

against him that might seriously damage his standing and associations in the community,' such as a charge of dishonesty or immorality, or would 'impose on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.' [Citations omitted.] A person's protected liberty interests are not infringed merely by defamatory statements, for an interest in reputation alone is not a constitutionally protected liberty interest. [Citations omitted.] Rather, the liberty interest is infringed only when the defamation is made in connection with the loss of a government benefit, such as,...employment. [Citations omitted.]" [22]

For example, in *Murden* v. *County of Sacramento*, the court found a protected liberty interest when a *temporary* deputy sheriff was dismissed from employment based on charges that he was engaging two female employees in embarrassing and inappropriate conversation regarding sexual activities. The court noted that the charge impugned the employee's character and morality, and if circulated, would damage his reputation and impair his ability to find other employment.

The court in *Murden* clarified that a dismissal based on charges that the employee was unable to learn the basic duties of the job does *not* constitute a protected interest.[23]

When the employer infringes on a person's liberty interest, due process simply requires notice to the employee, and an opportunity to refute the charges and clear his or her name. Moreover, the "name-clearing" hearing can take place *after* the actual dismissal.[24]

Accordingly, the Commission found that the due process clauses of the United States and California Constitutions apply when the charges supporting the dismissal of a probationary or at-will employee damage the employee's reputation and impair the employee's ability to find other employment.

Test Claim Legislation

As indicated above, employers are required by the due process clause to offer notice and hearing protections to *permanent* employees for dismissals, demotions, suspensions, reductions in salary and written reprimands.

Employers are also required by the due process clause to offer notice and hearing protections to *probationary* and *at-will* employees when the dismissal harms the employee's reputation and ability to obtain future employment.

As more fully discussed below, the Commission found that the test claim legislation imposes some of the *same* notice and hearing requirements imposed under the due process clause.

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[22] *Murden* v. *County of Sacramento* (1984) 160 Cal.App.3d 302, 308, quoting from *Board of Regents* v. *Roth*, *supra*, 408 U.S. at p. 573. See also *Paul* v. *Davis* (1976) 424 U.S. 693, 711-712; and *Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340.

[23] *Murden, supra.* 160 Cal.App.3d 302, 308.

[24] *Murden, supra*, 160 Cal.App.3d 302, 310; *Arnett* v.*Kennedy* (1974) 416 U.S. 134, 157; and *Codd* v. *Velger* (1977) 429 U.S. 624, 627.

Administrative Appeal

Government Code section 3304, as added by the test claim legislation, provides that "no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."[25]

Punitive action is defined in Government Code section 3303 as follows:

> "For the purpose of this chapter, punitive action means any action that may lead to dismissal, demotion, suspension, reduction in salary[26], written reprimand, or transfer for purposes of punishment."

The California Supreme Court determined that the phrase "for purposes of punishment" in the foregoing section relates only to a transfer and not to other personnel actions.[27] Thus, in transfer cases, the peace officer is required to prove that the transfer was intended for purposes of punishment in order to be entitled to an administrative appeal. If the transfer is to "compensate for a deficiency in performance," however, an appeal is not required.[28, 29]

In addition, at least one California appellate court determined that employers must extend the right to an administrative appeal under the test claim legislation to peace officers for other actions taken by the employer that result in "disadvantage, harm, loss or hardship" and impact the peace officer's career.[30] In *Hopson*, the court found that an officer who received a report in his personnel file by the police chief regarding a shooting in violation of policies and procedures was entitled to an administrative appeal under Government Code section 3304. The court held that the report constituted "punitive action" under the test claim legislation

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[25] In the Claimant's comments to the Draft Staff Analysis, the claimant recited Government Code section 3304, *as amended in 1997 (Stats. 1997, c. 148) and 1998 (Stats. 1998, c. 786)*. These amendments made substantive changes to Government Code section 3304 by adding subdivisions (c) through (g). These changes include a statute of limitations concerning how long the agency can use acts as a basis for discipline, a provision prohibiting the removal of a chief of police without providing written notice describing the reasons for the removal and an administrative hearing, and a provision limiting the right to an administrative appeal to officers who successfully complete the probationary period. The Commission noted that ***neither the 1997 nor 1998 statutes are alleged in this test claim.***

[26] The courts have held that "reduction in salary" includes loss of skill pay (*McManigal* v. *City of Seal Beach* (1985) 166 Cal.App.3d 975, pay grade (*Baggett* v. *Gates* (1982) 32 Cal.3d 128, rank (*White* v. *County of Sacramento* (1982) 31 Cal.3d 676, and probationary rank (*Henneberque* v. *City of Culver City* (1983) 147 Cal.App.3d 250.

[27] *White* v. *County of Sacramento* (1982) 31 Cal.3d 676.

[28] *Holcomb* v. *City of Los Angeles* (1989) 210 Cal.App.3d 1560; *Heyenga* v. *City of San Diego* (1979) 94 Cal.App.3d 756; *Orange County Employees Assn., Inc.* v. *County of Orange* (1988) 205 Cal.App.3d 1289.

[29] The claimant testified that what constitutes a transfer for purposes of punishment is in the eyes of the employee. The claimant stated that in the field if labor relations, peace officers will often request a full POBOR hearing and procedure on a transfer which is not acceptable to the officer in question, even though the transfer is not accompanied by a reduction in pay or benefits and no disciplinary action has been taken.

[30] *Hopson* v. *City of Los Angeles* (1983) 139 Cal.App.3d 347, 354, relying on *White* v. *County of Sacramento* (1982) 31 Cal.3d 676, 683.

based on the source of the report, its contents, and its potential impact on the career of the officer.[31]

The Commission recognized that the test claim legislation does not specifically set forth the hearing procedures required for the administrative appeal. Rather, the type of administrative appeal is left up to the discretion of each local agency and school district.[32] The courts have determined, however, that the type of hearing required under Government Code section 3304 must comport with standards of fair play and due process.[33, 34]

The Department of Finance and the State Personnel Board contended that Government Code section 3304 does not require an administrative appeal for probationary and at-will employees. They cited Government Code section 3304, subdivision (b), as it is *currently* drafted, which provides the following: "No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency against any public safety officer *who has successfully completed the probationary period that may be required by his or her employing agency* without providing the public safety officer with an opportunity for administrative appeal."

However, the Commission determined that the italicized language in section 3304, subdivision (b), was added by the Legislature in 1998 and became effective on January 1, 1999. (Stats. 1998, c. 768). When Government Code section 3304, subdivision (b), was originally enacted in 1976, it did not limit the right to an administrative appeal to permanent employees only. Rather, that section stated the following:

> "(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Accordingly, the Commission found that an administrative appeal under Government Code section 3304, subdivision (b), was required to be provided to probationary and at-will employees faced with punitive action or a denial of promotion until December 31, 1998.

The Department of Finance also contended that the cost of conducting an administrative hearing is already required under the due process clause and the *Skelly* case, which predate the test claim legislation.

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[31] *Id* at p. 353-354.

[32] *Binkley* v. *City of Long Beach* (1993) 16 Cal.App.4th 1795, 1806; *Runyan, supra*, 40 Cal.App.4th 961, 965.

[33] *Doyle* v. *City of Chino* (1981) 117 Cal.App.3d 673, 684. In addition, the court in *Stanton* v. *City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1442, held that the employee's due process rights were protected by the administrative appeals process mandated by Government Code section 3304. Furthermore, in cases involving "misconduct", the officer is entitled to a liberty interest name-clearing hearing under Government section 3304. *(Lubey* v. *City and County of San Francisco* (1979) 98 Cal.App.3d 340; *Murden, supra).*

[34] The Commission noted that at least two cases have referred to the need for an administrative appeals procedure that would enable the officer to obtain court review pursuant to Code of Civil Procedure section 1094.5. Such a review implies that an evidentiary hearing be held from which a record and findings may be prepared for review by the court. (*Doyle, supra*, 117 Cal.App. 3d 673; *Henneberque, supra*, 147 Cal.App.3d 250.) In addition, the California Supreme Court uses the words "administrative appeal" of section 3304 interchangeably with the word "hearing." (*White, supra*, 31 Cal.3d 676.)

> Even in a smaller department without such a section, hours conflict if command staff assigned to investigate works a shift different than the employees investigated. Payment of overtime occurs to the employees investigated or those performing the required investigation, or is at least a potential risk to an employer for the time an employee is interrogated pursuant to this section."

The Commission agreed. Conducting the investigation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts.

Accordingly, the Commission found that Government Code section 3303, subdivision (a), constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Notice Prior to Interrogation

Government Code section 3303, subdivisions (b) and (c), require the employer, prior to interrogation, to inform and provide notice of the nature of the investigation and the identity of all officers participating in the interrogation to the employee.

The Commission recognized that under due process principles, an employee with a property interest is entitled to notice of the disciplinary action proposed by the employer.[36] Thus, an employee is required to receive notice when the employee receives a dismissal, suspension, demotion, reduction in salary or receipt of a written reprimand. Due process, however, *does not* require notice prior to an investigation or interrogation since the employee has not yet been charged and the employee's salary and employment position have not changed.

Accordingly, the Commission found that providing the employee with prior notice regarding the nature of the interrogation and identifying the investigating officers constitutes a new program or higher level of service under article XIII B, section 6 of the California Constitution and imposes "costs mandated by the state" under Government Code section 17514.

Tape Recording of Interrogation

Government Code section 3303, subdivision (g), provides, in relevant part the following:

> "The complete interrogation of a public safety officer *may* be recorded. *If* a tape recording is made of the interrogation, the public safety officer shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. . . . The public safety officer being interrogated shall have the right to bring his or her own recording device and record any and all aspects of the interrogation." (Emphasis added.)

The claimant contended that the activity of tape recording the interrogation and providing the peace officer with the tape recording of the interrogation as specified in section 3303, subdivision (g), constitute reimbursable state mandated activities. The claimant stated the following:

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[36] *Skelly, supra*, 15 Cal.3d 194.

"As shown above, Government Code, section 3303 (g) allows the interrogation of a peace officer to be tape recorded. The section is silent as to whom may record the interrogation, and who may request that the session be recorded. In practice, the employee will almost always request to record the interrogation. As the employee desires to record same, the employer is faced with the requirement of also tape recording the interrogation in order to assure that the employee's tape is not edited, redacted, or changed in any manner, and to have a verbatim record of the proceedings."[37]

At the hearing, Ms. Dee Contreras, Director of Labor Relations for the City of Sacramento, testified as follows:

"If the employee comes in and tapes, and, trust me, they all come in and tape, if they're sworn peace officers, their attorneys come in with tapes. You wind up with two tape recorders on a desk. If they tape and we do not, then they have a record that we do no have or we must rely on a tape created by the employee we are investigating. That would not be a wise choice, from the employer's perspective."

"If we take notes and they tape, our notes are never going to be exactly the same as the tape is going to be if it's transcribed, so we wind up with what is arguably an inferior record to the record that they have."

"So it is essentially - - it says they may tape but the practical application of that is: For everybody who comes in with a tape recorder to tape, which is virtually every peace officer, we then must tape."[38]

The Department of Finance disagreed and contended that the test claim statute does not require local agencies to tape the interrogation. The Department further contended that if the local agency decides to tape the interrogation, the cost of providing the tape to the officer is required under the due process clause.

Based on the evidence presented at the hearing, the Commission recognized the reality faced by labor relations' professionals in their implementation of the test claim legislation. Accordingly, the Commission found that tape recording the interrogation when the employee records the interrogation is a mandatory activity to ensure that all parties have an accurate record. The Commission's finding is also consistent with the legislative intent to assure stable employer-employee relations are continued throughout the state and that effective services are provided to the people.[39]

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[37] Claimant's comments to Draft Staff Analysis.

[38] August 26, 1999 Hearing Transcript, page 18, lines 7-21.

[39] This finding is consistent with one of the principles of statutory construction that "where statutes provide for performance of acts or the exercise of power or authority by public officers protecting private rights or in public interest, they are mandatory." (3 Sutherland, Statutory Construction (5th ed. 1992) § 57.14, p. 36.) See also section 1183.1 of the Commission's regulations, which provides that the parameters and guidelines adopted on a mandated program shall provide a description of the most reasonable methods of complying with the mandate.

The Commission also recognized that Government Code section 3303, subdivision (g), requires that the employee shall have access to the tape if any further proceedings are contemplated or prior to any further interrogation at a subsequent time. The Commission found that providing the employee with access to the tape *prior to a further interrogation at a subsequent time* is a new activity and, thus, constitutes a new program or higher level of service.

However, the Commission found that providing the employee with access to the tape *if further proceedings are contemplated* does not constitute a new program or higher level of service when the further proceeding is a disciplinary action protected by the due process clause. Under certain circumstances, due process already requires the employer to provide an employee who holds either a property or liberty interest in the job with the materials upon which the disciplinary action is based.

Accordingly, the Commission found that even in the absence of the test claim legislation, the due process clause requires employers to provide the tape recording of the interrogation to the employee when:

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal[40]; and when
- The disciplinary action is based, in whole or in part, on the interrogation of the employee.

Under these circumstances, the Commission found that the requirement to provide access to the tape recording of the interrogation under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing access to the tape recording merely implements the requirements of the United States Constitution.

However, when the further proceeding does not constitute a disciplinary action protected by due process, the Commission found that providing the employee with access to the tape is a new activity and, thus, constitutes a new program or higher level of service.

In sum, the Commission found that the following activities constitute reimbursable state mandated activities:

- Tape recording the interrogation when the employee records the interrogation.
- Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories:

  (a) The further proceeding is not a disciplinary action;

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[40] *Skelly, supra*; *Ng, supra*; *Civil Service Assn., supra*; *Stanton, supra*; *Murden, supra*.

(b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);

(c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;

(d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;

(e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

Documents Provided to the Employee

Government Code section 3303, subdivision (g), also provides that the peace officer "shall" be entitled to a transcribed copy of any interrogation notes made by a stenographer or any reports or complaints made by investigators or other persons, except those that are deemed to be confidential.

The Department of Finance and the SPB contended that the cost of providing copies of transcripts, reports and recordings of interrogations are required under the due process clause and, thus, do not constitute a reimbursable state mandated program.

In *Pasadena Police Officers Association*, the California Supreme Court analyzed Government Code section 3303, noting that it does not specify when an officer is entitled to receive the reports and complaints. The court also recognized that section 3303 does not specifically address an officer's due process entitlement to discovery in the event the officer is *charged* with misconduct.[41] Nevertheless, the court determined that the Legislature intended to require law enforcement agencies to disclose the reports and complaints to an officer under investigation only *after* the officer's interrogation.[42]

The Commission recognized that the court's decision in *Pasadena Police Officers Association* is consistent with due process principles. Due process requires the employer to provide an employee who holds either a property or liberty interest in the job with a copy of the charges and materials upon which the disciplinary action is based when the officer is charged with misconduct.[43]

Accordingly, even in the absence of the test claim legislation, the Commission found that the due process clause requires the employer to provide a copy of all investigative materials, including non-confidential complaints, reports and charges when, as a result of the interrogation,

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[41] *Pasadena Police Officers Assn.* v. *City of Pasadena* (1990) 51 Cal.3d 564, 575 (Exhibit A, Bates page 0135).

[42] *Id.* at 579.

[43] *Skelly, supra.*

- A permanent employee is dismissed, demoted, suspended, receives a reduction in pay or a written reprimand; or
- A probationary or at-will employee is dismissed and the employee's reputation and ability to obtain future employment is harmed by the dismissal.

Under these circumstances, the requirement to produce documents under the test claim legislation *does not* impose a new program or higher level of service because this activity was required under prior law through the due process clause. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing the investigative materials in the above circumstances would not constitute "costs mandated by the state" since producing such documentation merely implements the requirements of the United States constitution.

However, the Commission found that the due process clause does not require employers to produce the charging documents and reports when requested by the officer in the following circumstances:

(a) When the investigation *does not* result in disciplinary action; and

(b) When the investigation results in:

- A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
- A transfer of a permanent, probationary or at-will employee for purposes of punishment;
- A denial of promotion for a permanent, probationary or at-will employees for reasons other than merit; or
- Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.

The Department of Finance and the State Personnel Board disagreed with this conclusion. They contended that "*State civil service* probationary or at-will employees are entitled to [the due process rights prescribed by] *Skelly* . . . . by the State Personnel Board" to the charging documents and reports and, thus, Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program with respect to these employees. However, they cited no authority for this proposition.

The Department of Finance and the State Personnel Board also contended that Government Code section 3303, subdivision (g), does not constitute a reimbursable state mandated program when a permanent employee is transferred based on their assertion that a transfer is covered by the due process clause. As noted earlier, the Commission disagreed with this contention and found that a permanent employee does *not* enjoy the rights prescribed by the due process clause when the employee is transferred.

Accordingly, in the circumstances described above, the Commission found that producing the documents required by Government Code section 3303, subdivision (g), constitutes a new program or higher level of service and imposes "costs mandated by the state" under Government Code section 17514.

Representation at Interrogation

Government Code section 3303, subdivision (i), provides that the peace officer "shall" have the right to be represented during the interrogation when a formal written statement of charges has been filed or whenever the interrogation focuses on matters that are likely to result in punitive action.

The claimant contended that Government Code section 3303, subdivision (i), results in reimbursable state mandated activities since additional professional and clerical time is needed to schedule the interview when the peace officer asserts the right to representation.

The Commission disagreed with the claimant's contention. Before the enactment of the test claim legislation, peace officers had the same right to representation under Government Code sections 3500 to 3510, also known as the Meyers-Milias-Brown Act (MMBA). The MMBA governs labor management relations in California local governments, including labor relations between peace officers and employers.[44]

Government Code section 3503, which was enacted in 1961, provides that employee organizations have the right to represent their members in their employment relations with public agencies. The California Supreme Court analyzed section 3503 in *Civil Service Association* v. *City and County of San Francisco*, a case involving the suspension of eight civil service employees. The court recognized an employee's right to representation under the MMBA in disciplinary actions.

> "We have long recognized the right of a public employee to have his counsel represent him at disciplinary hearings. (*Steen* v. *Board of Civil Service Commr.* (1945) 26 Cal.2d 716, 727; [Citations omitted.]) While *Steen* may have dealt with representation by a licensed attorney, the right to representation by a labor organization in the informal process here involved seems to follow from the right to representation contained in the Meyers-Milias-Brown Act and the right to representation recognized in *Steen*."[45]

Peace officers employed by school districts have similar rights under the Educational Employment Relations Act, beginning with Government Code section 3540.[46]

Based on the foregoing, the Commission found that the right to representation at the interrogation under Government Code section 3303, subdivision (i), *does not* constitute a new

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[44] *Santa Clara County Dist. Attorney Investigators Assn.* v. *County of Santa Clara* (1975) 51 Cal.App.3d 255.

[45] *Civil Service Assn.*, *supra*, 22 Cal.3d 552, 568.

[46] Government Code section 3543.2, which was added in 1975 (Stats. 1975, c. 961) provides that school district employees are entitled to representation relating to wages, hours of employment, and other terms and conditions of employment.

program or higher level of service under article XIII B, section 6 of the California Constitution.

Adverse Comments in Personnel File

Government Code sections 3305 and 3306 provide that no peace officer "shall" have any adverse comment entered in the officer's personnel file without the peace officer having first read and signed the adverse comment.[47] If the peace officer refuses to sign the adverse comment, that fact "shall" be noted on the document and signed or initialed by the peace officer. In addition, the peace officer "shall" have 30 days to file a written response to any adverse comment entered in the personnel file. The response "shall" be attached to the adverse comment.

Thus, the Commission determined that Government Code sections 3305 and 3306 impose the following requirements on employers:

- To provide notice of the adverse comment;[48]
- To provide an opportunity to review and sign the adverse comment;
- To provide an opportunity to respond to the adverse comment within 30 days; and
- To note on the document that the peace officer refused to sign the adverse comment and to obtain the peace officer's signature or initials under such circumstances.

The claimant contended that county employees have a pre-existing statutory right to inspect and respond to adverse comments contained in the officer's personnel file pursuant to Government Code section 31011. The claimant further stated that Labor Code section 1198.5 provides city employees with a pre-existing right to review, but not respond to, adverse comments. Thus, the claimant contended that Government Code sections 3305 and 3306 constitute a new program or higher level of service under article XIII B, section 6 of the California Constitution.

As described below, the Commission found that Government Code sections 3305 and 3306 constitute a *partial* reimbursable state mandated program.

Due Process

Under due process principles, an employee with a property or liberty interest is entitled to notice and an opportunity to respond, either orally or in writing, prior to the disciplinary action proposed by the employer.[49] If the adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a

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[47] The court in *Aguilar* v. *Johnson* (1988) 202 Cal.App.3d 241, 249-252, held that an adverse comment under Government Code sections 3305 and 3306 include comments from law enforcement personnel and citizen complaints.

[48] The Commission found that notice is required since the test claim legislation states that "no peace officer shall have any adverse comment entered in the officer's personnel file *without the peace officer having first read and signed the adverse comment*." Thus, the Commission found that the officer must receive notice of the comment before he or she can read or sign the document.

[49] *Skelly, supra,* 15 Cal.3d 194.

permanent peace officer or harms the officer's reputation and opportunity to find future employment, then the provisions of the test claim legislation which require notice and an opportunity to review and file a written response are already guaranteed under the due process clause.[50] Under such circumstances, the Commission found that the notice, review and response requirements of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service pursuant to article XIII B, section 6 of the California Constitution. Moreover, the Commission recognized that pursuant to Government Code section 17556, subdivision (c), the costs incurred in providing notice and an opportunity to respond do not impose "costs mandated by the state".

However, the Commission found that under circumstances where the adverse comment affects the officer's property or liberty interest as described above, the following requirements imposed by the test claim legislation *are not* required by the due process clause:

- Obtaining the signature of the peace officer on the adverse comment, or
- Noting the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances.

The Department of Finance and the State Personnel Board stated the following: "If the adverse comment can be considered a 'written reprimand,' however, the POBOR required 'notice' and the 'opportunity to respond' may already be required by due process. The extent of due process due an employee who suffers an official reprimand is not entirely clear."

The Commission agreed that if the adverse comment results in, or is considered a written reprimand, then notice and an opportunity to respond is already required by the due process clause and are not reimbursable state mandated activities. However, due process does not require the local agency to obtain the signature of the peace officer on the adverse comment, or note the peace officer's refusal to sign the adverse comment and obtain the peace officer's signature or initials under such circumstances. Accordingly, the Commission found that these two activities required by the test claim legislation when an adverse comment is received constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514 even where there is due process protection.

The Legislature has also established protections for local public employees similar to the protections required by Government Code sections 3305 and 3306 in statutes enacted prior to the test claim legislation. These statutes are discussed below.

Existing Statutory Law Relating to Counties

Government Code section 31011, enacted in 1974,[51] established review and response protections for county employees. That section provides the following:

> "Every county employee shall have the *right to inspect and review* any official record relating to his or her performance as an employee or to a grievance

[50] *Hopson, supra,* 139 Cal.App.3d 347.

[51] Stats. 1974, c. 315.

concerning the employee which is kept or maintained by the county; provided, however, that the board of supervisors of any county may exempt letters of reference from the provisions of this section.

The contents of such records shall be made available to the employee for inspection and review at reasonable intervals during the regular business hours of the county.

The county shall provide an opportunity for the employee to *respond* in writing, or personal interview, to any information about which he or she disagrees. Such response shall become a permanent part of the employee's personnel record. The employee shall be responsible for providing the written responses to be included as part of the employee's permanent personnel record.

This section does not apply to the records of an employee relating to the investigation of a possible criminal offense." (Emphasis added.)

Therefore, the Commission determined that under existing law, counties are required to provide a peace officer with the opportunity to review and respond to an adverse comment *if* the comment *does not* relate to the investigation of a possible criminal offense.[52] Under such circumstances, the Commission found that the review and response provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or

[52] The Commission found that Government Code section 31011 does *not* impose a notice requirement on counties since section 31011 does not require the county employee to review the comment *before* the comment is placed in the personnel file.

- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to Cities and Special Districts

Labor Code section 1198.5, enacted in 1975,[53] established review procedures for public employees, including peace officers employed by a city or special district. At the time the test claim legislation was enacted, Labor Code section 1198.5 provided the following:

> "(a) Every employer shall at reasonable times, and at reasonable intervals as determined by the Labor Commissioner, upon the request of an employee, permit that employee to inspect such personnel files which are used or have been used to determine that employee's qualifications for employment, promotion, additional compensation, or termination or other disciplinary action.
>
> (b) Each employer subject to this section shall keep a copy of each employee's personnel file at the place the employee reports to work, or shall make such file available at such place within a reasonable period of time after a request therefor by the employee. *A public employer shall, at the request of a public employee, permit the employee to inspect the original personnel files* at the location where they are stored at no loss of compensation to the employee.
>
> (c) *This section does not apply to the records of an employee relating to the investigation of a possible criminal offense*. It shall not apply to letters of reference.
>
> (d) If a local agency has established an independent employee relations board or commission, any matter or dispute pertaining to this section shall be under the jurisdiction of that board or commission, but an employee shall not be prohibited from pursuing any available judicial remedy, whether or not relief has first been sought from a board or commission.
>
> (e) This section shall apply to public employers, including, but not limited to, every city, county, city and county, district, and every public and quasi-public agency. This section shall not apply to the state or any state agency, and shall not apply to public school districts with respect to employees covered by Section 44031 of the Education Code. Nothing in this section shall be construed to limit the rights of employees pursuant to Section 31011 of the Government Code or Section 87031 of the Education Code, or to provide access by a public safety employee to confidential preemployment information."[54] (Emphasis added.)

Therefore, the Commission determined that under existing law, cities and special districts are required to provide a peace officer the opportunity to review the adverse comment *if* the

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[53] Stats. 1975, c. 908, § 1.

[54] Labor Code section 1198.5 was amended in 1993 to delete all provisions relating to local public employers (Stats. 1993, c. 59.) The Legislature expressed its intent when enacting the 1993 amendment "to relieve local entities of the duty to incur unnecessary expenses..."

comment *does not* relate to the investigation of a possible criminal offense.[55] Under such circumstances, the Commission found that the review provisions of Government Code sections 3305 and 3306 *do not* constitute a new program or higher level of service.

However, even if the adverse comment *does not* relate to the investigation of a possible criminal offense, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment *does* relate to the investigation of a possible criminal offense, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Existing Statutory Law Relating to School Districts

Education Code section 44031 establishes notice, review and response protections to peace officers employed by school districts. Section 44031 provides in relevant part the following:

> "(a) Materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved.
>
> "(d) *Information of a derogatory nature, except [ratings, reports, or records that were obtained in connection with a promotional examination], shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon.* An employee shall have the right

[55] The Commission found that Labor Code section 1198.5 does *not* impose a notice requirement on counties since section 1198.5 does not require the city or special district employee to review the comment *before* the comment is placed in the personnel file.

to enter, and have attached to any derogatory statement, his own comments thereon...." (Emphasis added.)

Education Code section 87031 provides the same protections to community college district employees.[56]

Therefore, the Commission determined that existing law, codified in Education Code sections 44031 and 87031, requires school districts and community college districts to provide a peace officer with notice and the opportunity to review and respond to an adverse comment *if* the comment *was not* obtained in connection with a promotional examination. Under such circumstances, the Commission found that the notice, review and response provisions of Government Code sections 3305 and 3306 do *not* constitute a new program or higher level of service.

However, even when Education Code sections 44031 and 87031 apply, if the adverse comment *was not* obtained in connection with a promotional examination, the Commission found that the following activities required by the test claim legislation were not required under existing law:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Accordingly, the Commission found that the above activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514.

Furthermore, the Commission found that when the adverse comment is obtained in connection with a promotional examination, the following activities constitute a new program or higher level of service and impose "costs mandated by the state" under Government Code section 17514:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

CONCLUSION

[56] Education Code sections 44031 and 87031 were derived from Education Code section 13001.5, which was originally added by Statutes of 1968, Chapter 433.

Based on the foregoing analysis, the Commission concluded that the test claim legislation constitutes a partial reimbursable state mandated program pursuant to article XIII B, section 6 of the California Constitution for the following reimbursable activities:

1. Providing the opportunity for an administrative appeal for the following disciplinary actions (Gov. Code, § 3304, subd. (b)):
   - Dismissal, demotion, suspension, salary reduction or written reprimand received by probationary and at-will employees whose liberty interest *are not* affected (i.e.; the charges supporting a dismissal do not harm the employee's reputation or ability to find future employment);
   - Transfer of permanent, probationary and at-will employees for purposes of punishment;
   - Denial of promotion for permanent, probationary and at-will employees for reasons other than merit; and
   - Other actions against permanent, probationary and at-will employees that result in disadvantage, harm, loss or hardship and impact the career opportunities of the employee.
2. Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
3. Providing prior notice to the peace officer regarding the nature of the interrogation and identification of the investigating officers. (Gov. Code, § 3303, subds. (b) and (c).)
4. Tape recording the interrogation when the employee records the interrogation. (Gov. Code, § 3303, subd. (g).)
5. Providing the employee with access to the tape prior to any further interrogation at a subsequent time, or if any further proceedings are contemplated and the further proceedings fall within the following categories (Gov. Code, § 3303, subd. (g)):
   (a) The further proceeding is not a disciplinary action;
   (b) The further proceeding is a dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e., the charges supporting the dismissal doe not harm the employee's reputation or ability to find future employment);
   (c) The further proceeding is a transfer of a permanent, probationary or at-will employee for purposes of punishment;
   (d) The further proceeding is a denial of promotion for a permanent, probationary or at-will employee for reasons other than merit;
   (e) The further proceeding is an action against a permanent, probationary or at-will employee that results in disadvantage, harm, loss or hardship and impacts the career of the employee.

6. Producing transcribed copies of any notes made by a stenographer at an interrogation, and reports or complaints made by investigators or other persons, except those that are deemed confidential, when requested by the officer in the following circumstances (Gov. Code, § 3303, subd. (g)):

   (a) When the investigation *does not* result in disciplinary action; and

   (b) When the investigation results in:

   - A dismissal, demotion, suspension, salary reduction or written reprimand received by a probationary or at-will employee whose liberty interest *is not* affected (i.e.; the charges supporting the dismissal do not harm the employee's reputation or ability to find future employment);
   - A transfer of a permanent, probationary or at-will employee for purposes of punishment;
   - A denial of promotion for a permanent, probationary or at-will employee for reasons other than merit; or
   - Other actions against a permanent, probationary or at-will employee that result in disadvantage, harm, loss or hardship and impact the career of the employee.

6. Performing the following activities upon receipt of an adverse comment (Gov. Code, §§ 3305 and 3306):

   School Districts

   (a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then schools are entitled to reimbursement for:

   - Obtaining the signature of the peace officer on the adverse comment; or
   - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

   (b) If an adverse comment *is* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for the following activities:

   - Providing notice of the adverse comment;
   - Providing an opportunity to review and sign the adverse comment;
   - Providing an opportunity to respond to the adverse comment within 30 days; and
   - Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* obtained in connection with a promotional examination, then school districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Counties

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then counties are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then counties are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

Cities and Special Districts

(a) If an adverse comment results in the deprivation of employment through dismissal, suspension, demotion, reduction in pay or written reprimand for a permanent peace officer, or harms the officer's reputation and opportunity to find future employment, then cities and special districts are entitled to reimbursement for:

- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(b) If an adverse comment *is* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to review and sign the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

(c) If an adverse comment *is not* related to the investigation of a possible criminal offense, then cities and special districts are entitled to reimbursement for the following activities:

- Providing notice of the adverse comment;
- Providing an opportunity to respond to the adverse comment within 30 days; and
- Obtaining the signature of the peace officer on the adverse comment; or
- Noting the peace officer's refusal to sign the adverse comment on the document and obtaining the signature or initials of the peace officer under such circumstances.

AUDITOR/CONTROLLER-RECORDER
COUNTY CLERK

COUNTY OF SAN BERNARDINO

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LARRY WALKER
Auditor/Controller-Recorder
County Clerk

ELIZABETH A. STARBUCK
Assistant Auditor/Controller-Recorder
Assistant County Clerk

December 22, 2006

REQUEST FOR RECONSIDERATION OF PRIOR FINAL DECISION

On behalf of County of San Bernardino

Government Code sections 3300 through 3310

Claim nos. CSM-4499 and 05-RL-4499-01
05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22

Peace Officer Procedural Bill Of Rights

Interested Party, County of San Bernardino, requests the Commission on State Mandates grant a hearing on the merits to reconsider its recent decision amending the parameters and guidelines of the Peace Officer Procedural Bill of Rights (POBOR) mandate. The County submits the following in support of its request.

INTRODUCTION

In 1999, this Commission issued its Statement of Decision in the Peace Officer Procedural Bill of Rights (POBOR) test claim finding that the legislation created a reimbursable state mandate. (Administrative Record (AR) at pp. 860-887.) In 2005, the Legislature requested, though AB 138 (Statutes of 2005, chapter 72, section 6), that the Commission address the applicability of the recent decisions of the California Supreme Court.

On June 15, 2006, the County brought forward a motion to amend the P's and G's to, *inter alia*, bring them into conformity with the original statement of decision with regard to interrogations. At the hearing on December 4, 2006, in addressing the proposed amendment, this Commission relied on the fact that this issue had been resolved by the reconsideration and that it was not properly pending before the Commission. In so doing, this Commission engaged in an error of law — the issue was properly pending before the Commission and required their due attention and decision.

In light of this error, this Commission should grant the County's request for a reconsideration and, finding that there is no evidence in the record to reverse the original decision of this Commission, reinstate the reimbursement for interrogation costs beyond the off-duty overtime payment to the peace officer subject of the interrogation.

A. Commission's Reliance on Staff's Assertion Regarding the Scope of the Prior Reconsideration Was an Error of Law.

Requests for reconsideration are permitted under California Code of Regulations, title 2, section 1188.4, subdivision (b), which states:

> Except as provided elsewhere in this Section, any interested party, affected state agency, or commission member may request that the commission reconsider or amend a test claim decision and change a prior final decision to correct an error of law.

In the instant case, the error of law was posed at the hearing when Commission Staff Counsel opined that the issue regarding interrogations had been decided as part of the reconsideration pursuant to AB 138 and was not properly before the Commission.[1] After which, this Commission found in accordance with the Final Staff Analysis that the issue had been resolved in the reconsideration. Staff, however, failed to recognize that: 1) the original statement of decision on the issue of interrogation was not accurately reflected in the parameters and guidelines, 2) the reimbursability of interrogation costs was specifically not addressed in the April 26, 2006, reconsideration decision and 3) an amendment properly brought before this Commission was pending and required resolution.

1. The 1990 Statement of Decision Included the Costs of Interrogation.

This Commission, in 1990, addressed the test claim legislation of POBOR which provides safeguards for the protection of peace officers that are subject of investigation or discipline. Of primary concern was whether and to what extent these safeguards and protections were more expansive than those already in existence through statute, case law and the Constitution. Indeed, as evidenced in the Statement of Decision, this Commission took particular care to root out those protections that were not duplicative of pre-existing due process rights and to delineate the scope and extent of the state-mandated activities. (AR at pp. 861-871.)

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[1] Counsel was heard to cite to pages 874 and 875 of the Administrative Record. These pages, however, address the tape recording of the interrogation which was not at issue at the December 4, 2006, hearing. The matter was addressed on pages 871 and 872 of the Administrative Record but even citing the correct pages fails to resolve the issue in a manner consistent with the evidentiary record.

This Commission made the following finding with regard to interrogations:

> Conducting the interrogation when the peace officer is on duty, and compensating the peace officer for off-duty time in accordance with regular department procedures are new requirements not previously imposed on local agencies and school districts. (AR at p. 872. Emphasis added.)

The use of the conjunctive "and" and the plural "requirements" refers to the fact that this Commission found that both the costs of conducting the interrogation during on-duty hours and the costs of paying overtime for off-duty time are reimbursable activities of the mandate.

When the parameters and guidelines were redrafted by Staff, however, this distinction was not just overlooked but was soundly rejected and the specific wording of the Commission's finding in its Statement of Decision was deleted. (AR at p. 912.) As a matter of law, the Statement of Decision is *res judicata* and this Commission cannot reverse itself or change its final decision unless by reconsideration pursuant California Code of Regulations, title 2, section 1188.4, subdivision (b). The record bears out that no request for reconsideration was made prior to the drafting of the parameters and guidelines. Therefore, the language adopted in the parameters and guidelines was an *ultra vires* act and could only be construed as an error. Indeed, even Staff itself concurs on the issue of the finality of the Commission's decisions:

> It is a well-settled principle of law that an administrative agency does not have jurisdiction to retry a question that has become final. If a prior decision is retried by the agency, that decision is void. (Final Staff Analysis (FSA), Item 13, December 4, 2006, hearing at p. 26. Citation omitted.)

Once claims were filed and audits were done, legitimate costs were being disallowed. Upon closer inspection, the error in the parameters and guidelines became apparent and an effort was made to bring this to the attention of this Commission for correction. The effort was buoyed by the legislatively directed reconsideration which the claiming community had anticipated would open the gates to numerous challenges and opportunities to clarify the barely adequate parameters and guidelines.

2. The Reconsideration Did Not Resolve the Interrogation Issue.

On April 26, 2006, this Commission began its review of its prior decision as directed by the Legislature. Interested parties brought forward a plethora of issues to be addressed by the Commission. (Statement of Decision (SOD) at pp. 8-9.) Specifically, the County of Sacramento, the County of Alameda, the County of Los Angeles and the County of Orange each addressed the issue with interrogations directly or touched upon it as part of investigations.

This Commission, however, carefully considered its very limited scope: the applicability of *San Diego Unified v. Commission on State Mandates* (2004) 33 Cal.4th 859 and other applicable decisions[2] to the reimbursable POBOR program. (SOD at pp. 11-12.) After sorting through a number of court cases on point, this Commission addressed the interrogation issue yet did so by only concluding that the ensuing case law did not impinge on its initial decision. (SOD at pp. 35-36.)

So, although having noted for the record that the counties had raised other issues including the issue of the reimbursability of interrogation costs, the matter stood unresolved by the very limited scope of the reconsideration. Yet, this Commission in its decision clearly noted that issues remained unresolved and directed its Staff to look into the establishment of a reasonable reimbursement methodology. (FSA at p. 3.) Since such a methodology requires a bedrock of clearly defined reimbursable activities, the claiming community again sought to bring the errant parameters and guidelines back into alignment with the original statement of decision.

3. The Interrogation Issue Was Properly Before the Commission at the December 4 Hearing.

On June 15, 2006, the County requested to amend the parameters and guidelines. (05-PGA-20) In addition to supporting an already proposed reasonable reimbursement methodology, the County sought again to bring this Commission's attention to the discord between the Statement of Decision and the resulting parameters and guidelines with regard to interrogations. (FSA at pp. 8 and 11 and Exhibit D thereto.)

Staff resolved the issue as follows:

> ...the Commission has already rejected the arguments raised by the County and Cities[3] for reimbursement of investigation costs and the cost to conduct the interrogation. Thus, staff finds that the SCO proposal is consistent with the Commission findings when adopting the parameters and guidelines and the Statement of Decision on reconsideration. (FSA at p. 22.)

This statement, however, does not resolve the issue. Staff failed to recognize that, by their own interpretation of law, the reconsideration could not act as a vehicle to resolve the issue — even though the issue had been duly raised and briefed. Indeed, until the December 4 hearing, the matter had not been addressed by this Commission or its Staff.

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[2] This other decision considered by the Commission was *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, otherwise known as the Kern High School District case.

[3] The County of San Bernardino was joined by the Cities of Los Angeles and Sacramento in pointing out the Commission the error in the parameters and guidelines.

Staff goes on to explain the basis for the earlier decision of the Commission. But, in doing so, Staff misquotes the original decision:

> The Commission's Statement of Decision includes the following reimbursable activity:
>
> Conducting an interrogation of a peace officer while the officer is on duty, or compensating the peace officer for off-duty time in accordance with regular department procedures. (Gov. Code, § 3303, subd. (a).)
>
> This activity was derived from Government Code section 3303, subdivision (a), which establishes the timing and compensation of a peace officer subject to an interrogation. Section 3303, subdivision (a), requires that the interrogation be conducted at a reasonable hour, preferably at a time when the peace officer is on duty, or during the normal waking hours of the peace officer, unless the seriousness of the investigation requires otherwise. At the test claim phase, the claimant contended that this section resulted in the payment of overtime to the peace officer employee. (See page 12 of the Commission's Statement of Decision.[4]) (FSA at p. 23. Emphasis added.)

This misquote changes the intent of the original decision and taints the Staff's analysis. In an effort to, again, draw attention to the issue, Bonnie Ter Keurst testified at the December 4 hearing. In her testimony, she quoted the original Statement of Decision language, emphasized that this issue was not addressed in the reconsideration and asked this Commission to make the correction in the parameters and guidelines. Instead of doing so, this Commission relied on statements in the Final Staff Analysis, which were echoed by counsel, and failed to give this issue the attention it deserves.

CONCLUSION

The County has brought before this Commission an important issue regarding an error that requires this Commission's full attention. Due to a misquote of a prior decision and a misstatement of fact, this Commission missed the opportunity to correct its prior error. The County requests this Commission grant its request for a hearing on the merits to reconsider its December 4, 2006, decision on the POBOR program.

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[4] Page 12 of the statement of decision refers to page 871 of the Administrative Record. The misquote, however, is actually found on page 13 of the statement of decision or 872 of the Administrative Record.

CERTIFICATION

I declare under penalty of perjury under the laws of the State of California that the statements made in this document are true and correct, except as to those matters stated upon information and belief and as to those matters, I believe them to be true.

Executed this 22nd day of December, 2006, at San Bernardino, California, by:

Bonnie Ter Keurst
Office of the Auditor/Controller-Recorder
County of San Bernardino

PROOF OF SERVICE BY MAIL

I, the undersigned, declare as follows:

I am a resident of the County of San Bernardino, and I am over the age of 18 years and not a party to the within action. My place of employment is 222 West Hospitality Lane, San Bernardino, CA 92415-0018

On December 22, 2006, I served:

REQUEST FOR RECONSIDERATION OF PRIOR FINAL DECISION

On behalf of County of San Bernardino

Government Code sections 3300 through 3310

Claim nos. CSM-4499 and 05-RL-4499-01
05-PGA-18, 05-PGA-19, 05-PGA-20, 05-PGA-21, and 05-PGA-22

Peace Officer Procedural Bill Of Rights

by placing a true copy thereof in an envelope addressed to each of the persons listed on the mailing list attached hereto, and by sealing and depositing said envelope in the United States mail at San Bernardino, California, with postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed this 22nd day of December, 2006, at San Bernardino, California.

Deborah Pittenger
Declarant
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